(19,577.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 477.

BERTHA DOCTOR AND KATHERINE SAYLES, APPELLANTS,

vs.

JOHN J. HARRINGTON, DENNIS A. HARRINGTON, SOL SAYLES COMPANY, AND SAYLES, ZAHN COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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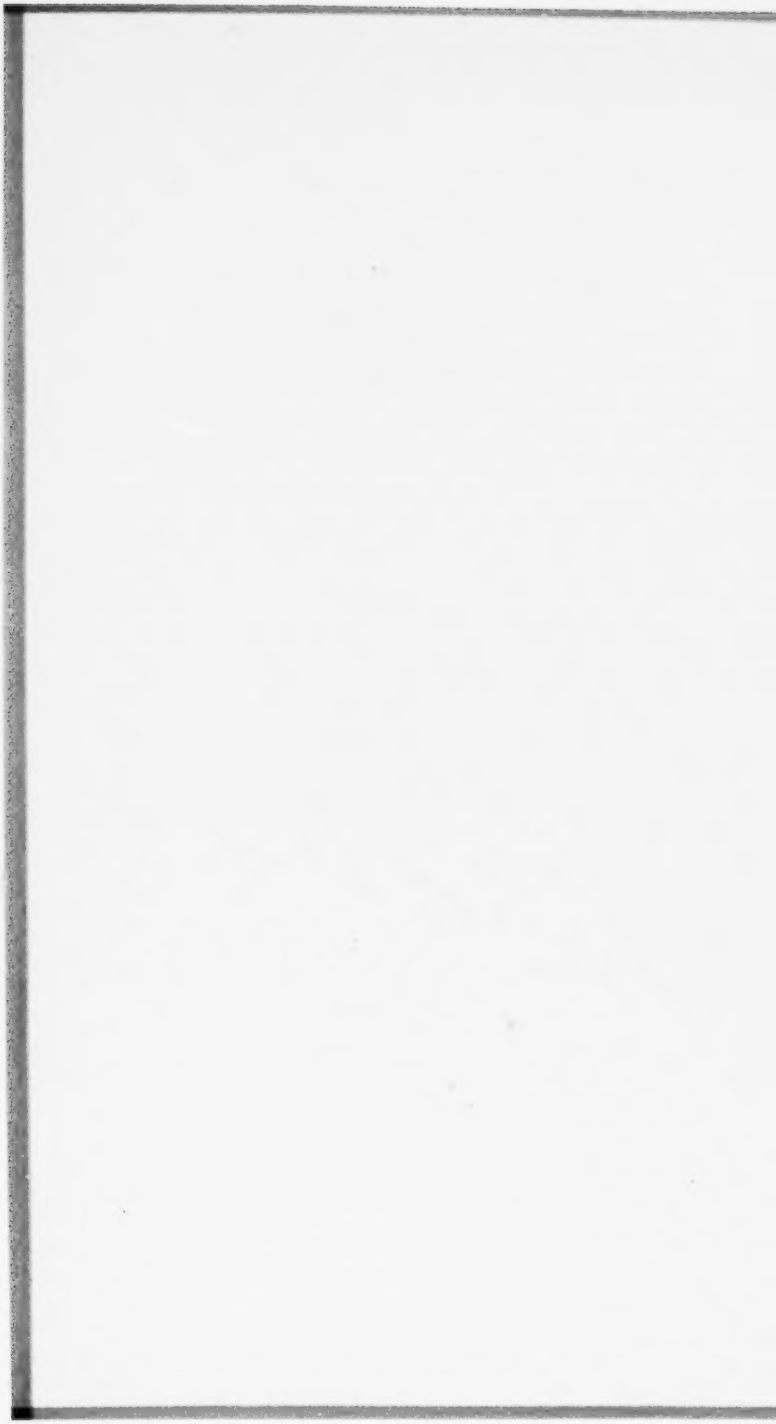

1 The President of the United States of America to John J. Harrington, Dennis A. Harrington, Sol Sayles Company, and Sayles, Zahn Company, Greeting:

You are hereby commanded that you and each of you personally appear before the judges of the circuit court of the United States of America, for the southern district of New York, in the second circuit, in equity, on the first Monday of October, A. D. 1904, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by Bertha Doctor and Katherine Sayles, and do further and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the borough of Manhattan, in the city of New York, on the 8th day of September, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States of America, the one hundred and twenty-ninth.

JOHN A. SHIELDS, Clerk.

GUGGENHEIMER, UNTERMYER & MARSHALL,
Solicitors for Complainants, 30 Broad St.

The defendants are required to enter appearance in the above cause, in the clerk's office of this court, on or before the first Monday of October, 1904, or the bill will be taken *pro confesso* against them.

J. A. S., Clerk.

2 I hereby certify, that on the 8th day of Sept. 1904 at the city of New York, in my district, I personally served the within subpœna in equity upon the within-named defendant Milton C. Bradley, at 128 Sixth Ave. N. Y. city individually by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, that on the 8th day of Sept. 1904, at the city of New York, in my district, I served the within subpœna in equity upon the within-named defendants Sayles Zahn Co. at 128 Sixth Ave. N. Y. city, by exhibiting to Milton C. Bradley as secretary of Sayles, Zahn Co. the within original, and at the same time leaving with him a copy thereof.

WM. HENKEL,
United States Marshal, Southern District of New York.

Dated Sept. 9, 1904.

I hereby certify, that on the 9th day of Sept. 1904, at the city of New York, in my district, I personally served the within subpœna in equity upon the within-named defendant John J. Harrington at 770 First Ave N. Y. city individually by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

I hereby further certify, that on the 9th day of Sept. 1904, at the city of New York, in my district, I served the within subpœna in equity upon the within-named defendants Sayles, Zahn Co. at 770 First Ave. N. Y. by exhibiting to John J. Harrington as treasurer of the Sayles, Zahn Company the within original, and at the same time leaving with him a copy thereof.

WM. HENKEL,
United States Marshal, Southern District of New York.

Dated Sept. 9, 1904.

U. S. circuit court, southern district of New York, filed Sep. 9, 1904. John A. Shields, clerk.

I further certify, that on the 8th day of Sept. 1904, at the city of New York, in my district, I served the within subpœna in
3 equity upon the within-named defendant Sol Sayles Company at 128 Sixth Ave. by exhibiting to Milton C. Bradley as secretary of said Sol Sayles Company the within original, and at the same time leaving with him a copy thereof.

WILLIAM HENKEL,
United States Marshal, Southern District of New York.

Dated November 16, 1904.
Amended return.

4 In the Circuit Court of the United States for the Southern District of New York.

BERTHA DOCTOR and KATHERINE SAYLES, Complainants,
against
JOHN J. HARRINGTON, DENNIS A. HARRINGTON, SOL Sayles Company, and Sayles, Zahn Company, Defendants. } In Equity.

To the honorable the judges of the circuit court of the United States for the southern district of New York:

Bertha Doctor and Katherine Sayles, being each of them a citizen of the State of New Jersey, bring this their bill against John J. Harrington and Dennis A. Harrington, each of them being a citizen of the State of New York and an inhabitant of the southern district of New York, and Sol Sayles Company and Sayles, Zahn Company,

each being a corporation organized and existing under and by virtue of the laws of the State of New York and having its principal office at the city of New York in said State, and an inhabitant of the southern district of New York, and thereupon your orators complain and say:

First. The complainant Bertha Doctor now is and at the time of the commission of the grievances hereinafter set forth was an inhabitant, resident and citizen of Madison, Morris county, New Jersey, and the complainant Katherine Sayles now is and at the time of the commission of the grievances hereinafter set forth was an inhabitant, resident and citizen of Berkeley Heights, Long Hill, Morris county, New Jersey.

Second. The defendants John J. Harrington and Dennis
5 A. Harrington now are and each of them is an inhabitant, resident and citizen of the State of New York and the southern district thereof. The defendant Sol Sayles Company is a citizen of the State of New York, being a corporation organized and incorporated by and existing under the laws of the State of New York. The defendant Sayles, Zahn Company is a citizen of the State of New York, being a corporation duly organized and incorporated by and existing under the laws of the State of New York. Each of said corporations has its principal office in the city of New York in said State and is an inhabitant of the southern district of New York.

Third. The defendant Sol Sayles Company was organized in the year 1896 for the purpose of carrying on the business of buying, selling and dealing in meats, poultry and vegetables and other merchandise at wholesale and retail, and to supply hotels and steamships in the State of New York and neighboring States. It was organized with a capital stock of one hundred thousand dollars, divided into one thousand shares of the par value of one hundred dollars per share, and the business carried on by it was profitable and its stock was at the time of its incorporation and has ever since continued to be of great value.

Fourth. The complainant Bertha Doctor is the owner of two hundred shares of said capital stock, and the complainant Katherine Sayles of three hundred shares thereof, and the defendants John J. Harrington and Dennis A. Harrington own or control the remaining five hundred shares thereof.

Fifth. By an arrangement made between the defendant John J.
Harrington and the predecessor in title of the complainant
6 Bertha Doctor, six shares of the stock belonging to her were loaned to the said defendant at his special instance and request, in order that he might exercise control over the said corporation until such time as the owner of said shares of stock should require their return in accordance with the arrangement made with the said John J. Harrington.

Sixth. The defendant John J. Harrington, exercising the power thus conferred upon him, has continued to control the defendant

Sol Sayles Company and has directed the management of its affairs and dictated its policy and has caused to be elected as its directors himself and the defendant Dennis A. Harrington, and also one John P. Nelson, one Milton C. Bradley and one Solomon Sayles, and caused the said Solomon Sayles to be chosen as the president of the said corporation, and the said Sayles thereafter acted as such president, but under the complete domination of the defendant John J. Harrington. The said Nelson and Bradley now are and for the past seven years have been in the employ of the defendants John J. Harrington and Dennis A. Harrington in the business carried on by them individually.

Seventh. On or about the 26th day of January, 1898, the defendant John J. Harrington caused to be organized the defendant Sayles, Zahn Company, for the purpose of taking over the business of the defendant Sol Sayles Company and of consolidating the same with a similar business heretofore conducted in the city of New York by one Henry Zahn, and in accordance with the plan of the said defendant John J. Harrington the defendant Sol Sayles Company on or about the first day of February, 1898, sold, assigned, transferred and set over unto the defendant Sayles, Zahn Company all
7 the good-will, machinery, tools, implements, furniture, fixtures, signs, safes, wagons, horses and harness belonging to and used by said defendant Sol Sayles Company in its business, in consideration of the issuance and delivery to the defendant Sol Sayles Company by the defendant Sayles, Zahn Company of fifty thousand dollars par value of the fully paid capital stock of the defendant Sayles, Zahn Company of a total authorized issue of two hundred thousand dollars of capital stock, and at the direction of the defendant John J. Harrington the said fifty thousand dollars of capital stock of the defendant Sayles, Zahn Company were issued for the benefit of the defendant Sol Sayles Company as follows: Five shares thereof in the name of Solomon Sayles, five shares thereof in the name of John P. Nelson aforesaid, five shares thereof in the name of Jacob L. Sayles, five shares thereof in the name of the defendant John J. Harrington, and four hundred and eighty shares thereof in the name of the aforesaid Milton C. Bradley. The said Solomon Sayles and Jacob L. Sayles immediately after the issuance of the said stock to them endorsed the certificates thereof and delivered the said shares of stock to the defendant John J. Harrington for and on behalf of the defendant Sol Sayles Company.

Eighth. The defendant Sol Sayles Company subscribed for fifty thousand dollars additional of the capital stock of the defendant Sayles, Zahn Company, agreeing to pay therefor at such times and in such amounts as the board of directors of the Sayles, Zahn Company should make a call therefor, and the complainants allege, on information and belief, that thereafter said subscription was duly paid and a certificate of stock issued to said Sol Sayles Company for five hundred shares.

Ninth. On or about the said first day of February, 1898,
8 the aforesaid Henry Zahn sold, assigned, transferred and set over unto the defendant Sayles, Zahn Company all the goodwill, machinery, tools, implements, furniture, fixtures, signs, safes, wagons, horses and harness belonging to him and appertaining to his business, receiving therefor fifty thousand dollars par value of the fully paid up stock of the defendant Sayles, Zahn Company.

Tenth. The defendant Sayles, Zahn Company has five directors, who for some years past have been the defendant John J. Harrington and the aforesaid Milton C. Bradley, John P. Nelson, Solomon Sayles and Henry Zahn, and the said defendant John J. Harrington has exercised control over and has dominated the said board of directors and controls its management.

Eleventh. The business of the defendant Sayles, Zahn Company has been profitable since its organization, its net profits during the six years which have elapsed since its incorporation aggregating upwards of three hundred thousand dollars.

Twelfth. Subsequent to the organization of the defendant Sayles, Zahn Company the defendant Sol Sayles Company conducted no active business except to collect accounts and bills receivable and other assets which it retained after the incorporation of the defendant Sayles, Zahn Company and the transfer to said corporation of the assets hereinbefore referred to. The assets so retained were of great value and have never been accounted for by the defendants herein or any of them.

Further complaining of the defendants herein the complainants allege upon information and belief:

Thirteenth. On or about the first day of February, 1899,
9 the defendants John J. Harrington and Dennis A. Harrington, who were copartners carrying on business under the firm name and style of J. J. Harrington & Company, combining, confederating and conspiring together, and with divers persons at present unknown to the complainants whose names when discovered the complainants pray that they may be at liberty to insert herein with apt words to charge them as parties defendant hereto, and contriving to wrong and injure the complainants in the premises, and with the purpose and intent to cheat and defraud the complainants herein out of their interest in the capital stock of the defendant Sol Sayles Company and out of the interest to which the defendant Sol Sayles Company was entitled in the assets of the defendant Sayles, Zahn Company, wrongfully and fraudulently caused the defendant Sol Sayles Company, which was under their domination and control as aforesaid, to execute and deliver to them, without any consideration whatsoever, its promissory notes aggregating twenty-three thousand seven hundred dollars, which were utterly fictitious and were devised by the defendants Harrington for the fraudulent purposes herein set forth.

Fourteenth. Thereafter and on or about the third day of October, 1902, the defendants John J. Harrington and Dennis A. Harring-

ton, in furtherance of their wrongful and fraudulent scheme aforesaid, caused to be instituted an action in the supreme court of the State of New York against the defendant Sol Sayles Company for the purpose of recovering a judgment against said corporation for the amount of the said promissory notes and the interest which was alleged to have accrued thereon. The complaint in said action was signed by one Philip J. Britt "as attorney for defendant." In truth and in fact the said Britt had for many years been the attorney and counsel for the defendants John J. Harrington and Dennis A. Harrington, was the attorney and counsel for the defendant Sol Sayles Company, and for the defendant Sayles, Zahn Company.

Fifteenth. The summons and complaint in said action were served on Solomon Sayles, the president of the defendant Sol Sayles Company, in the presence of the defendant John J. Harrington. The said Sayles was ignorant of the contents of the said papers, did not and was unable to read the same on account of his defective eyesight, and at the request of the defendant John J. Harrington, and in reliance upon his promise to attend to the matter, delivered to him the said summons and complaint immediately upon the service thereof and without having had any opportunity to confer with counsel with regard thereto or to take any measures to investigate the subject matter thereof.

Sixteenth. Thereupon the defendant John J. Harrington well knowing that the said Sayles and the defendant Sol Sayles Company were in utter ignorance of the nature of the said action and for the purpose of carrying out his fraudulent intent aforesaid, omitted to interpose any defence to the said action or to inform the stockholders of the defendant Sol Sayles Company, and particularly the complainants herein, of the institution thereof, and caused the said defendant Sol Sayles Company to default in said action, and thereafter, and on the 28th day of October, 1902, caused a judgment to be entered in the office of the clerk of the county of New York in favor of the defendants John J. Harrington and Dennis A. Harrington and against the defendant Sol Sayles Company for the sum of twenty-seven thousand three hundred and fifty-seven and 26/100 dollars, and immediately thereafter caused to be issued to the sheriff of the county of New York an execution directing the said
11 sheriff to collect the amount of said judgment out of the property and assets of the defendant Sol Sayles Company, and the sheriff, acting under the instructions of the said defendants John J. Harrington and Dennis A. Harrington and their attorney Philip J. Britt, thereupon and on said 28th day of October, 1902, called upon the aforesaid Milton C. Bradley and demanded of him the delivery of the certificates of stock in the Sayles, Zahn Company which belonged to the defendant Sol Sayles Company, whereupon the said Bradley, acting under the instructions of the defendants John J. Harrington and Dennis A. Harrington and of the said Britt, delivered to the said sheriff certificates representing one thou-

sand shares of the capital stock of the defendant Sayles, Zahn Company belonging to the defendant Sol Sayles Company of the par value of one hundred dollars per share, to wit, certificate No. 8 for five hundred shares; certificate No. 11 for five shares; certificate No. 12 for five shares; certificate No. 13 for five shares; certificate No. 14 for five shares; certificate 15 for four hundred and eighty shares, and also two bonds, each of the par value of one thousand dollars, being consolidated mortgage five per cent. bonds of the New Jersey Steamboat Company, numbered respectively 201 and 202, with thirty-eight coupons of the par value of twenty-five dollars each attached.

Seventeenth. On the 10th day of November, 1902, in furtherance of the aforesaid fraudulent conspiracy, the defendants John J. Harrington and Dennis A. Harrington caused the sheriff of the county of New York to sell all the right, title and interest of the defendant Sol Sayles Company in the aforesaid certificates of stock and bonds and caused the same to be purchased at said sale for their own benefit, and wrongfully and fraudulently concealed from the
12 complainants herein and from the said Solomon Sayles, and from all persons connected with the defendant Sol Sayles Company, other than the defendants Harrington and the aforesaid Nelson and Bradley, the facts aforesaid, and the complainants and the said Solomon Sayles learned of the aforesaid facts for the first time on or about the first day of July, 1904.

Eighteenth. The shares of stock so acquired by the defendants Harrington at the sale aforesaid were at the time of said sale, as the said defendants well knew, and have ever since continued to be, of the value of upwards of two hundred thousand dollars.

Nineteenth. Immediately upon being informed of the aforesaid facts the complainants caused a demand to be made upon the defendants John J. Harrington and Dennis A. Harrington that they transfer the said shares of stock and the said bonds to the defendant Sol Sayles Company, and that they cause to be issued to the complainants herein certificates representing their interests in the said shares of stock, but the said defendants have refused to comply with the said demand and have insisted that the said shares of stock and the said bonds are their personal and individual property, that neither the defendant Sol Sayles Company nor the complainants herein or either of them have any right, title or interest in the said shares of stock or the said bonds or any part thereof.

Twentieth. The complainants were and each of them was a shareholder of the defendant Sol Sayles Company at the time of the transactions herein complained of. This suit is not a collusive one to confer upon a court of the United States jurisdiction of a
13 case of which it would not otherwise have cognizance. The complainants are unable to secure any corporate action on the part of the defendant Sol Sayles Company to redress the wrongs hereinbefore set forth, nor are they able to obtain any redress at the hands of the stockholders of the said defendant Sol Sayles Company.

The board of directors of said corporation is under the absolute control and domination of the defendant John J. Harrington and the said Harrington, by reason of having possession of a majority of the capital stock of the said corporation, likewise controls the action of the stockholders. Although requested for information with regard to the facts hereinbefore set forth he has refused to give any information with regard thereto and has declined to redress the wrongs of which complaint is herein made or to give to the complainants any opportunity to lay before the board of directors or the stockholders of the defendant Sol Sayles Company the facts herein set forth.

Twenty-first. The complainants further allege that they greatly fear that the defendants John J. Harrington and Dennis A. Harrington will attempt to dispose of the aforesaid shares of stock and bonds to their injury, and that they will attempt to cause them to be transferred on the books of the defendant Sayles, Zahn Company in such a way as to elude the pursuit of the complainants and in order that the said defendants Harrington may enjoy the fruits of their aforesaid fraud, and that unless restrained and enjoined by this honorable court the defendant Sayles, Zahn Company will permit a transfer of said shares of stock to be made upon its books to the nominees and transferees of the defendants Harrington, all to the irreparable injury of the complainants.

14 Twenty-second. The defendants Harrington and the defendant Sol Sayles Company have failed and refused to account to the complainants with respect to the business and assets of the said corporation since the organization of the defendant Sayles, Zahn Company, and with respect to the dividends earned and paid on the shares of stock in the defendant Sayles, Zahn Company belonging to the defendant Sol Sayles Company and which are now claimed by the defendants Harrington by reason of the fraudulent schemes, devices and acts hereinbefore referred to.

Twenty-third. All of which acts, doings and pretences of the said defendants are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of the complainants in the premises. In consideration whereof and for as much as the complainants are remediless in the premises at and by the strict rules of common law and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable, and to the end that said complainants may have such relief, they humbly pray this honorable court that (1) the judgment obtained by the defendants Harrington against the defendant Sol Sayles Company in the supreme court of the State of New York on the 28th day of October, 1902, be declared fraudulent, null and void, and that the same be vacated and set aside; (2) that the levy and sale under the execution issued on the aforesaid judgment to the sheriff of the county of New York be likewise declared fraudulent, null and void and be vacated and set aside; (3) that the defendants Harrington be required to deliver to the defendant Sol Sayles Company the shares of stock and the bonds so sold under the aforesaid execution,

and that thereupon the defendant Sol Sayles Company be required to distribute the said certificates of stock of the defendant Sayles,
15 Zahn Company to the several stockholders of the defendant Sol Sayles Company in accordance with their respective interests therein, to wit, to the complainant Bertha Doctor two hundred shares of said capital stock, to the complainant Katherine Sayles three hundred shares thereof, and the remainder to the remaining stockholders of the defendant Sol Sayles Company; (4) that the defendant Sol Sayles Company account to the complainants for all dividends received by it and to which it was entitled on account of the shares held by it in the Sayles, Zahn Company, and for all of its acts with regard thereto; that the defendants John J. Harrington, Dennis A. Harrington, and each of them, be required to account for all shares of stock of the Sayles, Zahn Company which have come into the possession of them or either of them, for all dividends received thereon or upon any portion of said shares of stock, for the bonds of the New Jersey Steamboat Company, for all interest received on account of said bonds or the coupons attached thereto, for all moneys received and collected from accounts, bills receivable and other assets belonging to the defendant Sol Sayles Company and with respect to the business and affairs of said defendant Sol Sayles Company; (5) that the defendants John J. Harrington, Dennis A. Harrington and Sol Sayles Company, and each of them, and each of their attorneys, agents and the directors, officers, employees and servants of the said corporation be severally restrained and enjoined by both the temporary and permanent decrees of this honorable court, from transferring to any person, firm, or corporation, other than to the complainants herein, any of the shares of stock of the Sayles, Zahn Company, or the bonds of the New Jersey Steamboat Company, hereinbefore described, or any interest in the said shares of stock or the
16 said bonds, or in the dividends accruing or accrued thereon, and from in any manner interfering therewith; or any of the six shares of stock of the Sol Sayles Company, or any dividends accruing or accrued thereon, or any interest in such shares of stock or dividends, which were received by the defendant John J. Harrington as hereinbefore alleged; (6) and that the defendant Sayles, Zahn Company and each and every of the officers, directors, agents, employees, servants, attorneys and representatives thereof be enjoined and restrained by both the temporary and permanent decrees of this honorable court, from permitting any of its shares of stock heretofore standing in the name of the Sol Sayles Company, or of the defendants John J. Harrington, Dennis A. Harrington, John P. Nelson or Milton C. Bradley, to be transferred to any person, firm or corporation until the further decree of this honorable court in the premises; that they may have not only the writ of injunction of this honorable court, but also that a writ of subpœna be granted directed to the defendants hereinbefore named, requiring them and

each of them to appear on a certain day therein to be named before this honorable court, then and there full, true and direct answers to make to all and singular the premises, but not under oath, which is hereby expressly waived, and further to perform and abide by such further order or decree as to the court may seem meet; that the complainants may have such other and further relief as may be equitable, just and proper in the premises.

BERTHA DOCTOR,
KATHERINE SAYLES,
Complainants.

GUGGENHEIMER, UNTERMYER & MARSHALL,
Solicitors for Complainants.

Office and post office address: 30 Broad street, borough of Manhattan, New York city.

17 STATE OF NEW JERSEY, } ss.:
County of Morris, }

Bertha Doctor and Katherine Sayles, being each duly sworn according to law, severally depose and say:

I am one of the complainants named in and have read the foregoing bill of complaint. The same is true of my own knowledge except as to such matters as are therein stated on information and belief, and as to such statements I believe it to be true.

(Signed) BERTHA DOCTOR,
" KATHERINE SAYLES.

Subscribed and sworn to before me this 27th day of August, 1904.

NATHANIEL C. TOMS,
[SEAL.] Master in Chancery of New Jersey.

STATE OF NEW JERSEY, } ss.:
County of Morris, }

I, Daniel S. Voorhees, clerk of the county of Morris, and also clerk of the court of common pleas holden in and for said county, the same being a court of record, do hereby certify that Nathaniel C. Toms by whom the foregoing affidavit was taken and certified was, at the time of taking such affidavit, a master in chancery of the State of New Jersey, residing in said county, duly commissioned and sworn, and fully authorized by the laws of the State of New Jersey to take the same, and also the acknowledgments and proofs of deeds, mortgages and conveyances of real estate in said county and State, and that I am well acquainted with the handwriting of said master in chancery, and verily believe that the name subscribed to the said certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of court at Morristown, this 29 day of August 1904.

[SEAL.] (Signed) DANIEL S. VOORHEES.

18 (Endorsed:) Circuit court of the United States, southern dist. N. Y.—Bertha Doctor and Katherine Sayles, complainants, against John J. Harrington, Dennis A. Harrington, Sol Sayles Company and Sayles, Zahn Company, defendants.—Bill of complaint.—Guggenheimer, Untermyer & Marshall, attorneys for complainants, No. 30 Broad street, city of New York.—U. S. circuit court, southern district of New York, Filed Sep. 8, 1904, John A. Shields, clerk.

19 In the Circuit Court of the United States for the Southern District of New York.

BERTHA DOCTOR and KATHERINE SAYLES, Complainants,
against
JOHN J. HARRINGTON, DENNIS A. HARRINGTON, SOL Sayles Company, and Sayles, Zahn Company, Defendants. } In Equity.

Please take notice, that the defendants, John J. Harrington and Dennis A. Harrington, appear in this action and that I am retained as solicitor for said defendants therein, in accordance with the rules and practice of this court.

Dated borough of Manhattan, city of New York, October 3rd, 1904.

Respectfully, PHILIP J. BRITT,
Solicitor for Defendants, John J. Harrington and Dennis A. Harrington.

Office & P. O. address, No. 27 William street, borough of Manhattan, New York city.

To the circuit court of the United States, for the southern district of New York; Messrs. Guggenheimer, Untermyer & Marshall, solicitors for complainants, office & P. O. address, No. 30 Broad street, borough of Manhattan, New York city.

(Endorsed:) In the circuit court of the United States, for the southern district of New York.—Bertha Doctor and Katherine Sayles, complainants, against John J. Harrington, Dennis A. Harrington, Sol Sayles Company and Sayles Zahn Company, defendants.—Appearance on behalf of defendants, John J. Harrington and Dennis A. Harrington.—Philip J. Britt, att'y for def'ts Harrington, No. 27 William St. New York city.—U. S. circuit court, southern district of New York, Filed Oct. 3, 1904, John A. Shields, clerk.

20 In the Circuit Court of the United States for the Southern District of New York.

BERTHA DOCTOR and KATHERINE SAYLES, Complainants,
against
JOHN J. HARRINGTON, DENNIS A. HARRINGTON, SOL Sayles Company, and Sayles, Zahn Company, Defendants. } In Equity.

Please take notice, that the defendant, Sayles Zahn Company, appears in this action, and that I am retained as solicitor for said defendant therein, in accordance with the rules and practice of this court.

Dated borough of Manhattan, city of New York, October 3rd, 1904.

Respectfully, ROBERT O'BYRNE,
Solicitor for Defendant, Sayles Zahn Co.

Office & P. O. address, No. 27 William street, borough of Manhattan, New York city.

To the circuit court of the United States, for the southern district of New York; Messrs. Guggenheimer, Untermyer & Marshall, solicitors for complainants, office & P. O. address, No. 30 Broad street, borough of Manhattan, New York city.

(Endorsed:) In the circuit court of the United States, for the southern district of New York.—Bertha Doctor and Katherine Sayles, complainants, against John J. Harrington, Dennis A. Harrington, Sol Sayles Company and Sayles, Zahn Company, defendants.—Appearance on behalf of defendant, Sayles Zahn Co.—Robert O'Byrne, att'y for def't, Sayles, Zahn Company, 27 William St. New York city.—U. S. circuit court, southern district of New York, Filed Oct. 3, 1904, John A. Shields, clerk.

21 In the Circuit Court of the United States for the Southern District of New York.

BERTHA DOCTOR and KATHERINE SAYLES, Complainants,
against
JOHN J. HARRINGTON, DENNIS A. HARRINGTON, SOL Sayles Company, and Sayles, Zahn Company, Defendants. } In Equity.

The defendants John J. Harrington and Dennis A. Harrington now and at all times hereafter saving to themselves all and all manner of benefit and exception or otherwise that can or may be had or

taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much therein as these defendants are advised it is material or necessary for them to make answer to, jointly and severally, answering say:

First. That as to whether or not the complainant Bertha Doctor now is and at the times mentioned in the bill of complaint herein was an inhabitant, resident and citizen of Madison, Morris county, New Jersey, and as to whether or not the complainant Katherine Sayles now is and at the times alleged in the bill of complaint was an inhabitant, resident and citizen of Berkeley Heights, Long Hill, Morris county, New Jersey, these defendants have not sufficient information on which to base a belief, and therefore deny the same.

Second. These defendants admit each and every allegation made and contained in paragraphs "second" and "third" of the bill of complaint herein, except the allegation contained in the "third" paragraph to the effect, that the business carried on by the
22 Sol Sayles Company was profitable, and that its stock was at the time of its incorporation and has ever since continued to be of great value, which these defendants deny.

Third. That as to whether or not the complainant Bertha Doctor is the owner of two hundred shares of the capital stock of Sol Sayles Company, and as to whether or not Katherine Sayles is the owner of three hundred shares thereof, as set out in the "fourth" paragraph of the bill of complaint, these defendants have not sufficient information on which to base a belief, and therefore deny the same, and allege the truth to be, that these defendants John J. Harrington and Dennis A. Harrington own and control, and have since the year 1897 owned and controlled, five hundred and five shares of the capital stock of said company.

Fourth. These defendants deny that there was an arrangement made between the defendant John J. Harrington and the predecessor in title of the complainant Bertha Doctor by which six shares of the capital stock of said company belonging to her were loaned to said defendant, at his instance and request, in order that he might exercise control over the said corporation until such time as the owner of such shares should require their return in accordance with said arrangement, as alleged in the "fifth" paragraph of the bill of complaint herein.

Fifth. These defendants deny each and every allegation made and contained in the "sixth" paragraph of the bill of complaint herein, and allege the truth to be, that ever since the year 1897 and up to the present time the directors of said Sol Sayles Company have been Solomon Sayles, Jacob L. Sayles, John P. Nelson and each of these defendants, and that when elected directors said per-
23 sons were always elected by the unanimous vote of the capital stock represented at the meeting of stockholders. These defendants further allege the truth to be, that neither said Nelson nor Milton C. Bradley, in said bill of complaint mentioned, are now or

ever have been during the past seven years, in the employ of these defendants in the business carried on by them individually.

Sixth. These defendants admit that on or about the 26th day of January, 1898, the defendant Sayles Zahn Company was organized for the purpose of taking over the business of the defendant Sol Sayles Company and of consolidating the same with the similar business theretofore conducted in the city of New York by one Henry Zahn, and that on or about the 1st day of February, 1898, the defendant Sol Sayles Company sold, assigned, transferred and set over unto the defendant Sayles Zahn Company all the good will, machinery, tools, implements, furniture, fixtures, signs, safes, wagons, horses and harness belonging to and used by said Sol Sayles Company in its business, in consideration of the issuance and delivery to the defendant Sol Sayles Company by the defendant Sayles Zahn Company of $50,000 par value of the fully paid capital stock of the defendant Sayles Zahn Company out of a total authorized issue of $200,000 of capital stock. But these defendants deny that said $50,000 of capital stock of the Sayles Zahn Company was issued upon the direction of the defendant John J. Harrington in the manner described in the "seventh" paragraph of the bill of complaint herein, and also that Solomon Sayles and Jacob L. Sayles immediately after the issuance of said stock to them endorsed the certificates thereof and delivered the same to the defendant John J. Harrington for and on behalf of the defendant Sol Sayles Company, and as to those matters allege the truth to be, that the capital stock of the Sayles Zahn Company to the amount of $50,000 was
24 issued at the time mentioned in the bill of complaint to the persons and in the manner directed by the Sol Sayles Company, and that said Solomon Sayles and Jacob L. Sayles delivered the certificates of stock issued to them to the secretary of the defendant Sol Sayles Company.

Seventh. These defendants admit the allegations made and contained in paragraphs "eighth" and "ninth" of the bill of complaint herein.

Eighth. These defendants admit the allegations made in paragraph "tenth" of the bill of complaint, except the allegations that Milton C. Bradley was a director of the defendant Sayles Zahn Company, and that the defendant John J. Harrington exercised control over and has dominated the said board of directors and controls its management, which allegations these defendants deny.

Ninth. These defendants deny the allegations contained in the "eleventh" paragraph of the bill of complaint herein.

Tenth. These defendants admit the allegations contained in the "twelfth" paragraph of the bill of complaint herein, except the allegation therein made that the assets retained by the Sol Sayles Company after the organization of the Sayles Zahn Company have never been accounted for by the defendants, or any of them, which allegation these defendants deny, and allege the truth to be, that while the assets retained by said Sol Sayles Company were of great

value and were all collected by said Sol Sayles Company, the debts and liabilities of said Sol Sayles Company were largely in excess of its assets, and that all of said assets were fully accounted for.

Eleventh. These defendants deny each and every allega-
25 tion made and contained in paragraph "thirteenth" of the bill of complaint herein, except the allegation that these defendants were on or about the 1st day of February, 1899 co-partners carrying on business under the firm name and style of J. J. Harrington & Company, which allegation these defendants admit; and these defendants further allege, that they are at present and at all the times mentioned in the bill of complaint herein were such co-partners transacting business under said firm name and style in the city of New York.

Twelfth. These defendants deny that on or about the 3rd day of October, 1902 they, in furtherance of a wrongful or fraudulent scheme, as alleged in the "fourteenth" paragraph of the bill of complaint herein, caused to be instituted an action in the supreme court of the State of New York against the defendant Sol Sayles Company, and allege the truth to be, that on or about said day these defendants began an action against the defendant Sol Sayles Company in the supreme court of the State of New York to recover a judgment against said corporation for the amount of certain promissory notes and interest thereon, which were made, executed and delivered by said Sol Sayles Company to these defendants for a good and valuable consideration. These defendants further allege, that if the complaint in said action was signed by one Philip J. Britt "as attorney for defendant," it was the result of but a clerical or typographical error, and that said Philip J. Britt was in fact the attorney for the plaintiffs in said action, and that at said time and for a long time prior thereto said Philip J. Britt had ceased to be the attorney for the defendant therein Sol Sayles Company.

26 Thirteenth. Upon information and belief, these defendants deny each and every allegation made and contained in paragraph "fifteenth" of the bill of complaint herein, except the allegation that the summons and complaint in the aforesaid action of these defendants against the Sol Sayles Company was served on Solomon Sayles, the president of the defendant Sol Sayles Company, which allegation these defendants admit.

Fourteenth. These defendants deny the allegations made and contained in the "sixteenth" paragraph of the bill of complaint herein, except the allegations that on the 28th day of October, 1902 these defendants entered a judgment in the office of the clerk of the county of New York in the aforesaid action in favor of these defendants and against said Sol Sayles Company for the sum of $27,357.26, and that they caused an execution to be issued upon said judgment to the sheriff of the county of New York, directing said sheriff to collect the amount of said judgment out of the property of the defendant Sol Sayles Company, and that said sheriff subsequently levied under said execution, in accordance with the provisions of

the laws of the State of New York in regard thereto, upon property of said defendant Sol Sayles Company, which is specifically described and designated in said "sixteenth" paragraph of the bill of complaint herein, by taking the same from the possession of said defendant Sol Sayles Company and Milton C. Bradley, which allegations these defendants admit, and these defendants further allege, that at the time of the aforesaid levy by the sheriff of the county of New York under the execution aforesaid, said Milton C. Bradley was the assistant secretary and treasurer of the defendant Sol Sayles Company.

Fifteenth. These defendants deny each and every allegation made and contained in paragraphs "seventeenth" and "eigh-
27 teenth" of the bill of complaint herein, and allege the truth to be, that on the 10th day of November, 1902, the sheriff of the county of New York, under the execution aforesaid, duly sold all the right, title and interest of the defendant Sol Sayles Company in and to the aforesaid stock and bonds, in conformity and after duly complying with all the provisions of the laws of the State of New York in regard to the sale of personal property by a sheriff under an execution, and after these defendants had caused notice of said sale to be published in a daily newspaper published upon that day in the city of New York, to wit, the New York Times, said notice containing a statement of the time and place of sale and a description of the property to be sold, and that these defendants duly and properly and without fraudulent intent or design purchased said property at said sheriff's sale.

Sixteenth. These defendants have been informed and believe that about three or four months ago a demand was made upon them that they transfer the aforesaid shares of stock and the aforesaid bonds to the defendant Sol Sayles Company, and admit that they have refused to comply with said demand, and have insisted that said shares of stock and said bonds are their personal and individual property, and that neither the defendant Sol Sayles Company nor the complainants herein, nor either of them, have any right, title or interest in said shares of stock or the said bonds or any part thereof.

Seventeenth. These defendants deny that they have any knowledge or information upon which to base a belief as to the allegations made and contained in the "twentieth" and "twenty-first" paragraphs of this bill of complaint herein, and therefore deny the same.

Eighteenth. These defendants deny the allegations made and contained in the "twenty-second" paragraph of the bill of com-
28 plaint herein.

Nineteenth. These defendants, further answering the bill of complaint herein, further say, that they are advised and humbly submit, that neither of the complainants have any interest in the matters in question in this suit, nor in the matters aforesaid, so as to entitle them or either of them to sustain this suit, and these defend-

ants crave the same benefit from this defense as if they had demurred to said bill.

Twentieth. These defendants, further answering the bill of complaint herein, further say, that they are advised and humbly submit, that it appears by the complainants' own showing by the said bill, that they are not entitled to the relief prayed by said bill against these defendants, and that the bill of complaint of the complainants herein should be dismissed, because if any right of action exists in favor of the complainants against these defendants, arising out of the matters and things referred to in the bill of complaint herein, said complainants have an adequate remedy at law therefor, and these defendants crave the same benefit from this defense as if they had demurred to said bill.

Twenty-first. And these defendants further deny all and all manner of unlawfull combination, fraud, fraudulent intent and conspiracy whatsoever wherewith they and each of them are by the said bill of complaint charged; without this, there is any other matter, cause or thing in complainants' said bill of complaint contained material or necessary for these defendants to make answer to, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, all of which matters and things these defendants are ready and willing to aver, maintain and prove as this honorable court shall direct; and humbly pray to be
29 hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

JOHN J. HARRINGTON,
DENNIS A. HARRINGTON,
Defendants.

PHILIP J. BRITT,
Solicitor for Defendants,
John J. Harrington and Dennis A. Harrington.

Office & P. O. address, # 27 William street, borough of Manhattan, New York city..

I hereby certify that the foregoing answer is, in my opinion, well founded in point of law.

Dated, November 7, 1904.

PHILIP J. BRITT,
Solicitor for Defendants, John J. Harrington and Dennis A. Harrington.

30 STATE OF NEW YORK, }
County of New York, Southern } *ss.:*
District of New York, }

John J. Harrington and Dennis A. Harrington, being each duly sworn, severally depose and say:

I am one of the above named defendants; so much of the fore-

going answer as concerns my own acts and deeds is true to the best of my knowledge, and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

JOHN J. HARRINGTON.
DENNIS A. HARRINGTON.

Sworn to before me, this 5th day of November, 1904.

ROBERT O'BYRNE,
Notary Public, Kings Co.,
Cert. Filed in N. Y. Co.

(Endorsed:) In the circuit court of the United States, for the southern district of New York.—Bertha Doctor and Katherine Sayles, complainants, against John J. Harrington, Dennis A. Harrington, Sol Sayles Company and Sayles Zahn Company, defendants.—Answer of defendants John J. Harrington and Dennis A. Harrington.—Philip J. Britt, att'y for def'ts Harrington, No. 27 William St. New York city.—U. S. circuit court, southern district of New York, Filed Nov. 7, 1904, John A. Shields, clerk.

31 In the Circuit Court of the United States for the Southern District of New York.

BERTHA DOCTOR and KATHERINE SAYLES, Complainants,
against
JOHN J. HARRINGTON, DENNIS A. HARRINGTON, SOL Sayles Company, and Sayles, Zahn Company, Defendants. } In Equity.

The defendant Sayles Zahn Company now and at all times hereafter saving to itself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering says:

First. That this defendant is a corporation duly organized and existing under the laws of the State of New York, and that it has a capital stock of $200,000. divided into two thousand shares of the par value of $100. per share, and that fifteen hundred shares of the authorized capital stock has been issued, and that it is engaged in the business of buying, selling and dealing in meats, poultry, vegetables and other merchandise at wholesale and retail, and the supplying of hotels and steamships in and around the State of New York.

Second. That this defendant is a stranger to all and singular the matters and things stated and alleged in the complainants' bill of

complaint, and therefore leaves these complainants to make such proof thereof as they shall be able to produce.

32 SAYLES, ZAHN COMPANY,
[SEAL.] By MILTON C. BRADLEY, Sec't'y.

ROBERT O'BYRNE,
Solicitor for Defendant,
Sayles, Zahn Company,

Office & P. O. address, # 27 William street, borough of Manhattan, New York city.

STATE OF NEW YORK,
County of New York, Southern } ss:
District of New York,

On this 7th day of November, 1904, before me personally appeared Milton C. Bradley, the secretary of the Sayles Zahn Company, one of the defendants above named, who being by me duly sworn, did depose and say, that he is the secretary of the Sayles Zahn Company, and familiar with its business; that he has read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

MILTON C. BRADLEY.

Sworn to before me, November 7th, 1904.
G. A. C. BARNETT,
[SEAL.] Notary Public, No 27, N. Y. Co.

(Endorsed:) In the circuit court of the United States, for the southern district of New York.—Bertha Doctor and Katherine Sayles, complainants, against John J. Harrington, Sol Sales Company and Sayles, Zahn Company, defendants.—Answer of
33 defendant Sayles Zahn Company.—Robert O'Byrne, att'y for def't Sayles Zahn Company, 27 William St. New York city.—U. S. circuit court, southern district of New York, Fled Nov. 7, 1904, John A. Shields, clerk.

34 In the Circuit Court of the United States for the Southern District of New York.

BERTHA DOCTOR and KATHERINE SAYLES, Complainants,
against
JOHN J. HARRINGTON, DENNIS A. HARRINGTON, SOL Sayles Company, and Sayles, Zahn Company, Defendants. } In Equity.

The replication of the above named complainants to the answer of the above named defendants, John J. Harrington and Dennis A. Harrington.

These replicants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendants, for replication thereunto sayeth that they do and will ever maintain and prove their said bill to be true, certain, and sufficient in the law to be answered unto by said defendants, and that the answer of said defendants is very uncertain, evasive, and insufficient in the law to be replied unto by these replicants; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things these replicants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly — as in and by their said bill they have already prayed.

GUGGENHEIMER, UNTERMYER & MARSHALL,
Solicitors for Complainants.

35 UNITED STATES OF AMERICA,
District of New Jersey, County of Morris, } *ss.:*

Katherine Sayles, being duly sworn, deposes and says: I am one of the complainants herein; I have read the foregoing replication and know the contents thereof, and the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

KATHERINE SAYLES.

Sworn to before me this 12th day of November, 1904.

[SEAL.]

NATHANIEL C. TOMS,
Master in Chancery of New Jersey.

STATE OF NEW JERSEY, County of Morris, } ss:

I, Daniel S. Voorhees, clerk of the county of Morris, and also clerk of the court of common pleas holden in and for said county, the same being a court of record, do hereby certify that Nathaniel C. Toms by whom the foregoing affidavit was taken and certified was, at the time of taking such affidavit, a master in chancery of the State of New Jersey, residing in said county, duly commissioned and sworn and fully authorized by the laws of the State of New Jersey to take the same, and also the acknowledgements and proofs of deeds, mortgages and conveyances of real estate in said county and State, and that I am well acquainted with the handwriting of said master in chancery, and verily believe that the name subscribed to the said certificate is genuine.

36 In testimony whereof, I have hereunto set my hand and affixed the seal of court at Morristown, this 14th day of November, 1904.

[SEAL.] DANIEL S. VOORHEES, Clerk.

(Endorsed:) United States circuit court, southern district of New York.—Bertha Doctor and Katherine Sales, complainants, against John J. Harrington and others, defendants (in equity)—Replication to answer of defendants John J. Harrington and Dennis A. Harrington, Guggenheimer, Untermyer & Marshall, solicitors for defendants, No. 30 Broad St. city of New York.—U. S. circuit court, southern district of New York, Filed Nov. 15, 1904, John A. Shields, clerk.

37 In the Circuit Court of the United States for the Southern District of New York.

BERTHA DOCTOR and KATHERINE SAYLES, Complainants,
against
JOHN J. HARRINGTON, DENNIS A. HARRINGTON, SOL Sayles Company, and Sayles, Zahn Company, Defendants. } In Equity.

The replication of the above named complainants to the answer of the above named defendant, Sayles, Zahn Company.

These replicants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendant, for replication thereunto sayeth that they do and will ever maintain and prove their said bill to be true, certain, and sufficient in the law to be answered unto by said defendant, and

that the answer of said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by these replicants; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, transversed, or denied, is true; all which matters and things these replicants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly — as in and by their said bill they have already prayed.

GUGGENHEIMER, UNTERMYER & MARSHALL,
Solicitors for Complainants.

38 UNITED STATES OF AMERICA, District of New Jersey, County of Morris, } ss.:

Katherine Sayles, being duly sworn, deposes and says: I am one of the complainants herein; I have read the foregoing replication and know the contents thereof, and the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

KATHERINE SAYLES.

Sworn to before me this 12th day of November, 1904.

NATHANIEL C. TOMS,
[SEAL.] Master in Chancery of New Jersey.

STATE OF NEW JERSEY, County of Morris, } ss.:

I, Daniel S. Voorhees, clerk of the county of Morris, and also clerk of the court of common pleas holden in and for said county, the same being a court of record, do hereby certify that Nathaniel C. Toms by whom the foregoing affidavit was taken and certified was, at the time of taking such affidavit, a master in chancery of the State of New Jersey, residing in said county, duly commissioned and sworn and fully authorized by the laws of the State of New Jersey to take the same, and also the acknowledgements and proofs of deeds, mortgages and conveyances of real estate in said county and State, and that I am well acquainted with the handwriting of said master in chancery, and verily believe that the name subscribed to the said certificate is genuine.

39 In testimony whereof, I have hereunto set my hand and affixed the seal of court at Morristown, this 14th day of November, 1904.

[SEAL.] DANIEL S. VOORHEES, Clerk.

(Endorsed:) United States circuit court, southern district of New York.—Bertha Doctor and Katherine Sayles, complainants, against John J. Harrington and others, defendants. In equity.—Replication to answer of defendant Sayles, Zahn Company.—Guggenheimer, Untermyer & Marshall, solicitors for defendants, No. 30 Broad street, city of New York.—U. S. circuit court, southern district of New York, Filed Nov. 15, 1904, John A. Shields, clerk.

40 United States Circuit Court for the Southern District of New York.

BERTHA DOCTOR and KATHERINE SAYLES, Complainants, *against* JOHN J. HARRINGTON, DENNIS A. HARRINGTON, Sol Sayles Company, and Sayles, Zahn Company, Defendants.	In Equity. Action No. 1.

Upon the bill of complaint herein and the answers of the defendants John J. Harrington and Dennis A. Harrington and the Sayles Zahn Company, and the replication filed by the complainants herein, and upon the affidavit of Philip J. Britt, solicitor for the defendants John J. Harrington and Dennis A. Harrington, verified the 5th day of December, 1904, and hereunto annexed, and upon all the papers and proceedings herein, let the complainants, Bertha Doctor and Katherine Sayles, and their solicitors, attorneys and counsel, show cause before the United States circuit court for the southern district of New York, appointed to be held at room No. 124, in the United States post-office building, in the borough of Manhattan, in the city of New York, on the 9th day of December, 1904, at 2 o'clock in the afternoon of said day, or as soon thereafter as counsel can be heard, why the bill of complaint of the complainants herein should not be dismissed on the ground that this court has not jurisdiction of this cause, and why the defendants should not have such other and further relief as to the court may seem just and proper in the premises; and, in the meantime —.

Dated, New York city, the 5th day of December, 1904.

E. HENRY LACOMBE, U. S. C. J.

41 United States Circuit Court for the Southern District of New York.

BERTHA DOCTOR and KATHERINE SAYLES, Complainants, *against* JOHN J. HARRINGTON, DENNIS A. HARRINGTON, Sol Sayles Company, and Sayles, Zahn Company, Defendants. } In Equity. Action No. 1.

STATE OF NEW YORK, County of New York, } ss.:

Philip J. Britt, being duly sworn, says, that he is the solicitor for John J. Harrington and Dennis A. Harrington, two of the defendants in the above entitled action.

That this action was begun by the complainants in the month of September 1904, and issue was joined herein by the filing of an answer on behalf of the defendants John J. Harrington and Dennis A. Harrington and the defendant Sayles Zahn Company on the first Monday of November, 1904. That a replication was filed by the complainants in the month of November 1904. That deponent was served with a notice of the examination of witnesses on the part of the complainants before John A. Shields, Esq., one of the standing examiners of this court, at his office in the United States post office building, in the borough of Manhattan, city of New York, on the 1st day of December, 1904, at 10.30 o'clock in the forenoon of that day. That upon said date and at the said time and place there attended Louis Marshall, Esq., counsel for the complainants, John J. Adams, Esq., of counsel for the defendants Harrington, and your deponent, as well as Robert O'Byrne, Esq., the solicitor for the defendant Sayles Zahn Company. That said John A. Shields, Esq., was not present at said time and place, having been confined
42 to his house by illness, and the defendants' solicitors refused to consent to have witnesses sworn or any testimony taken in the absence of said John A. Shields. That later in the day of said 1st day of December, 1904, deponent, as solicitor for the defendants John J. Harrington and Dennis A. Harrington, was served with a notice that the examination of witnesses on the part of the complainants would take place before the aforesaid John A. Shields or Thomas Alexander, Esq., or such other of the standing examiners of this court as may be present at their office, room No. 78, in the United States post office building, New York city, on the 3rd day of December, 1904, at 10.30 o'clock of the forenoon of that day.

That this action is sought to be maintained in the circuit court of the United States, upon the ground that the complainants are residents, inhabitants and citizens of the State of New Jersey, and that all of the defendants are citizens of the State of New York.

That an examination of the bill of complaint, which is herewith presented and hereby made a part of this affidavit with the same force and effect as if more fully and at large set forth herein, shows that these complainants seek to maintain this action by reason of their claiming to be stockholders of the Sol Sayles Company, but that it is in reality an action by the corporation, the Sol Sayles Company, and that this is a derivative suit. The bill of complaint shows the Sol Sayles Company and the Sayles Zahn Company to be corporations organized and existing under the laws of the State of New York, and further show that the defendants, John J. Harrington and Dennis A. Harrington are also residents and citizens of the State of New York.

The bill of complaint further shows that the complainants are not parties to the suit in their individual characters, but
43 merely as members and component parts of the body or legal entity known as the Sol Sayles Company, and are, therefore, to be presumed to reside where the domicile of the Sol Sayles Company was fixed by law, and are also to be regarded as citizens of the State of New York from which the Sol Sayles Company derived its existence and powers.

That this action being, therefore, one in which all of the real parties are citizens of the State of New York, and inasmuch as the jurisdiction of the circuit court of the United States is limited to that conferred upon it by the Constitution and the laws of the United States, deponent respectfully submits, that this court has not jurisdiction to entertain this action, and deponent prays that an order may be made herein dismissing the complainants' bill of complaint herein, and deponent further prays, that all proceedings on the part of the complainants, their attorneys, solicitors and counsel be stayed until the final hearing and determination of this motion and the entry of the order thereon.

Deponent further states, that no previous application has been made to any court or judge thereof for this order.

PHILIP J. BRITT.

Sworn to before me this 5th day of December, 1904.

[SEAL.] ROBERT O'BYRNE,
Notary Public, Kings Co., Cert. Filed in N. Y. Co.

44 (Endorsed:) Doctor *v.* Harrington. In arranging the parties relatively to the controversy the Sol Sayles Co. must be grouped on the side of the complainants. That would result in bringing citizens of the same State on both sides of the litigation, and this court is without jurisdiction. E. H. Lacombe U. S. C. J. Motion granted. Dec. 10, 1904.

(Endorsed:) United States circuit court, for the southern district of New York.—Bertha Doctor and Katherine Sayles, complainants, against John J. Harrington, Dennis A. Harrington, Sol Sayles Company and Sayles Zahn Company, defendants.—Affidavit and order

to show cause—Philip J. Britt, attorney for def'ts Harrington, No. 27 William St. New York city.—Due and timely service of a copy of the within affidavit and order to show cause is hereby admitted. Dated Dec. 5th, 1904. Robert O'Byrne, solicitor for Sayles, Zahn Co.—Copy received Dec. 3, 1904, Guggenheimer, Untermyer & Marshall, solicitors for complainants.—U. S. circuit court, southern district of New York, Filed Dec. 10, 1904, John A. Shields, clerk.

45 At a term of the United States circuit court, for the southern district of New York, held in the borough of Manhattan, New York city, at the post office therein, on the 16th day of December, 1904.

Present: Hon. E. Henry Lacombe, circuit judge.

BERTHA DOCTOR and KATHERINE SAYLES, Complainants,
against
JOHN J. HARRINGTON, DENNIS A. HARRINGTON, SOL SAYLES Company, and Sayles, Zahn Company, Defendants.

A motion having been made herein on behalf of the defendants John J. Harrington and Dennis A. Harrington for an order dismissing the bill of complaint of the complainants herein, on the ground that this court has not jurisdiction of this cause of action, and said motion having come on to be heard before this court on the 9th day of December, 1904; and after reading and filing the bill of complaint of the complainants herein and the answers of the defendants John J. Harrington and Dennis A. Harrington, and the answer of the defendant Sayles Zahn Company, and the replication thereto filed by the complainants herein, and the affidavit of Philip J. Britt, the solicitor for the defendants John J. Harrington and Dennis A. Harrington, verified the 5th day of December, 1904, and the order to show cause why the bill of complaint of the complainants herein should not be dismissed on the ground that this court has not jurisdiction of this cause, granted herein on the 5th day of December, 1904, and after hearing John J. Adams, Esq., of counsel for the defendants, John J. Harrington and Dennis A. Harrington, in favor of the granting of said motion, and Louis Marshall, Esq.,
46 of counsel for the complainants herein, in opposition thereto, and Robert O'Byrne, Esq., solicitor for the defendant Sayles Zahn Company, appearing and not objecting to the granting of this motion, and due deliberation having been had, it is

Ordered, that the bill of complaint of the complainants herein be and the same is hereby dismissed, on the ground that this court has not jurisdiction of this cause of action.

E. H. LACOMBE,
U. S. Circuit Judge.

47 United States Circuit Court for the Southern District of New York.

BERTHA DOCTOR and KATHERINE SAYLES, Complainants,
against
JOHN J. HARRINGTON, DENNIS A. HARRINGTON, SOL SAYLES Company, and Sayles, Zahn Company, Defendants.

SIRS: You will please take notice, that the foregoing is a copy of an order which will be presented to Hon. E. Henry Lacombe, circuit judge of the United States circuit court, for the southern district of New York, at his chambers, in the New York post office building, in the borough of Manhattan, in the city of New York, on the 16th day of December, 1904, at 10:30 o'clock in the forenoon of said day, for settlement and entry.

Dated New York, December 14th, 1904.

Yours, &c.,
PHILIP J. BRITT,
Solicitor for Defendants John J. Harrington and Dennis A. Harrington.

Office & P. O. address, No. 27 William street, borough of Manhattan, New York city.

To Messrs. Guggenheimer, Untermyer & Marshall, solicitors for complainants, No. 30 Broad street, New York city; Robert O'Byrne, Esq., solicitor for defendant Sayles, Zahn Co., No. 27 William street, New York city.

48 (Endorsed:) United States circuit court, southern dist. of New York.—Bertha Doctor and Katherine Sayles, complainants, against John J. Harrington, Dennis A. Harrington, Sol Sayles Company and Sayles Zahn Company, defendants.—Order and notice of settlement.—Philip J. Britt, solicitor for def'ts Harrington, No. 27 William St. New York city.—Due and timely service of a copy of the within proposed order and notice of settlement is hereby admitted. Dated December 14th, 1904. Robert O'Byrne, solicitor for def't Sayles, Zahn Co.—Copy received, Dec. 14, 1904 Guggenheimer, Untermyer & Marshall, solicitors for complainants.—U. S. circuit court, southern district of New York, Filed Dec. 16, 1904, John A. Shields, clerk.

49 In the Circuit Court of the United States for the Southern District of New York.

BERTHA DOCTOR and KATHERINE SAYLES, Complainants,
against
JOHN J. HARRINGTON, DENNIS A. HARRINGTON, SOL Sayles Company, and Sayles, Zahn Company, Defendants. } In Equity.

Certificate of question of jurisdiction upon appeal from the circuit court of the United States for the southern district of New York, second circuit, to the Supreme Court of the United States.

This cause coming on for hearing upon the application of the defendants John J. Harrington, Dennis A. Harrington, Sol Sayles Company and Sayles, Zahn Company, to dismiss the said cause on the ground of want of jurisdiction in this court to consider the same, and said application having been duly submitted to and fully considered by this court, said application to dismiss was sustained, and a decree dismissing this cause was duly entered by this court for the reason and upon the ground that the court had no jurisdiction of the said cause upon the facts alleged in the complainants' bill of complaint, to which ruling the complainants duly excepted.

And the said complainants being desirous of taking an appeal from the decree of the court sustaining said application to dismiss, and dismissing this cause as aforesaid, and having this day applied to this court for a certificate as required in such cases,

50 Now, therefore, the court hereby certifies to the Supreme Court of the United States, the question of jurisdiction which has arisen upon the aforesaid application to dismiss, to wit, whether or not the complainants' bill of complaint showed that there was such diversity of citizenship between the parties complainant and parties defendant in this cause as would be sufficient under the provisions of the United States Revised Statutes to confer jurisdiction upon the United States circuit court for the southern district of New York, of this cause.

And this court hereby certifies that the allegations of the complainants' bill of complaint are as follows, to wit:

Bertha Doctor and Katherine Sayles, being each of them a citizen of the State of New Jersey, bring this their bill against John J. Harrington and Dennis A. Harrington, each of them being a citizen of the State of New York and an inhabitant of the southern district of New York, and Sol Sayles Company and Sayles, Zahn Company, each being a corporation organized and existing under and by virtue of the laws of the State of New York and having its principal office at the city of New York in said State, and an inhabitant of the

southern district of New York, and thereupon your orators complain and say:

First. The complainant Bertha Doctor now is and at the time of the commission of the grievances hereinafter set forth was an inhabitant, resident and citizen of Madison, Morris county, New Jersey, and the complainant Katherine Sayles now is and at the time of the commission of the grievances hereinafter set forth was an inhabitant, resident and citizen of Berkeley Heights, Long Hill, Morris county, New Jersey.

Second. The defendants John J. Harrington and Dennis A.
51 Harrington now are and each of them is an inhabitant, resident and citizen of the State of New York and the southern district thereof. The defendant Sol Sayles Company is a citizen of the State of New York, being a corporation organized and incorporated by and existing under the laws of the State of New York. The defendant Sayles, Zahn Company is a citizen of the State of New York, being a corporation duly organized and incorporated by and existing under the laws of the State of New York. Each of said corporations has its principal office in the city of New York in said State and is an inhabitant of the southern district of New York.

Third. The defendant Sol Sayles Company was organized in the year 1896 for the purpose of carrying on the business of buying, selling and dealing in meats, poultry and vegetables and other merchandise at wholesale and retail, and to supply hotels and steamships in the State of New York and in neighboring States. It was organized with a capital stock of one hundred thousand dollars, divided into one thousand shares of the par value of one hundred dollars per share, and the business carried on by it was profitable and its stock was at the time of its incorporation and has ever since continued to be of great value.

Fourth. The complainant Bertha Doctor is the owner of two hundred shares of said capital stock, and the complainant Katherine Sayles of three hundred shares thereof, and the defendants John J. Harrington and Dennis A. Harrington own or control the remaining five hundred shares thereof.

Fifth. By an arrangement made beween the defendant John J.
Harrington and the predecessor in title of the complainant
52 Bertha Doctor, six shares of the stock belonging to her were loaned to the said defendant at his special instance and request, in order that he might exercise control over the said corporation until such time as the owner of said shares of stock should require their return in accordance with the arrangement made with the said John J. Harrington.

Sixth. The defendant John J. Harrington, exercising the power thus conferred upon him, has continued to control the defendant Sol Sayles Company and has directed the management of its affairs and dictated its policy and has caused to be elected as its directors himself and the defendant Dennis A. Harrington, and also one John P. Nelson, one Milton C. Bradley and one Solomon Sayles, and caused

the said Solomon Sayles to be chosen as the president of the said corporation, and the said Sayles thereafter acted as such president, but under the complete domination of the defendant John J. Harrington. The said Nelson and Bradley now are and for the past seven years have been in the employ of the defendants John J. Harrington and Dennis A. Harrington in the business carried on by them individually.

Seventh. On or about the 26th day of January, 1898, the defendant John J. Harrington caused to be organized the defendant Sayles, Zahn Company, for the purpose of taking over the business of the defendant Sol Sayles Company and of consolidating the same with a similar business heretofore conducted in the city of New York by one Henry Zahn, and in accordance with the plan of the said defendant John J. Harrington the defendant Sol Sayles Company on or about the first day of February, 1898, sold, assigned, transferred and set over unto the defendant Sayles, Zahn Company all
53 the good-will, machinery, tools, implements, furniture, fixtures, signs, safes, wagons, horses and harness belonging to and used by said defendant Sol Sayles Company in its business, in consideration of the issuance and delivery to the defendant Sol Sayles Company by the defendant Sayles, Zahn Company of fifty thousand dollars par value of the fully paid capital stock of the defendant Sayles, Zahn Company of a total authorized issue of two hundred thousand dollars of capital stock, and at the direction of the defendant John J. Harrington the said fifty thousand dollars of capital stock of the defendant Sayles, Zahn Company were issued for the benefit of the defendant Sol Sayles Company as follows: Five shares thereof in the name of Solomon Sayles, five shares thereof in the name of John P. Nelson aforesaid, five shares thereof in the name of Jacob L. Sayles, five shares thereof in the name of the defendant John J. Harrington, and four hundred and eighty shares thereof in the name of the aforesaid Milton C. Bradley. The said Solomon Sayles and Jacob L. Sayles immediately after the issuance of the said stock to them endorsed the certificates thereof and delivered the said shares of stock to the defendant John J. Harrington for and on behalf of the defendant Sol Sayles Company.

Eighth. The defendant Sol Sayles Company subscribed for fifty thousand dollars additional of the capital stock of the defendant Sayles, Zahn Company, agreeing to pay therefor at such times and in such amounts as the board of directors of the Sayles, Zahn Company should make a call therefor, and the complainants allege, on information and belief, that thereafter said subscription was duly paid and a certificate of stock issued to said Sol Sayles Company for five thousand shares.

Ninth. On or about the said first day of February, 1898,
54 the aforesaid Henry Zahn sold, assigned, transferred and set over unto the defendant Sayles, Zahn Company all the good-will, machinery, tools, implements, furniture, fixtures, signs, safes,

wagons, horses and harness belonging to him and appertaining to his business, receiving therefor fifty thousand dollars par value of the fully paid up stock of the defendant Sayles, Zahn Company.

Tenth. The defendant Sayles, Zahn Company has five directors, who for some years past have been the defendant John J. Harrington and the aforesaid Milton C. Bradley, John P. Nelson, Solomon Sayles and Henry Zahn, and the said defendant John J. Harrington has exercised control over and has dominated the said board of directors and controls its management.

Eleventh. The business of the defendant Sayles, Zahn Company has been profitable since its organization, its net profits during the six years which have elapsed since its incorporation aggregating upwards of three hundred thousand dollars.

Twelfth. Subsequent to the organization of the defendant Sayles, Zahn Company the defendant Sol Sayles Company conducted no active business except to collect accounts and bills receivable and other assets which it retained after the incorporation of the defendant Sayles, Zahn Company and the transfer to said corporation of the assets hereinbefore referred to. The assets so retained were of great value and have never been accounted for by the defendants herein or any of them.

Further complaining of the defendants herein the complainants allege, upon information and belief:

Thirteenth. On or about the first day of February, 1899,
55 the defendants John J. Harrington and Dennis A. Harrington, who were copartners carrying on business under the firm name and style of J. J. Harrington & Company, combining, confederating and conspiring together, and with divers persons at present unknown to the complainants whose names when discovered the complainants pray that they might be at liberty to insert herein with apt words to charge them as parties defendant hereto, and contriving to wrong and injure the complainants in the premises, and with the purpose and intent to cheat and defraud the complainants herein out of their interest in the capital stock of the defendant Sol Sayles Company and out of the interest which the defendant Sol Sayles Company was entitled in the assets of the defendant Sayles, Zahn Company, wrongfully and fraudulently caused the defendant Sol Sayles Company, which was under their domination and control as aforesaid, to execute and deliver to them, without any consideration whatsoever, its promissory notes aggregating twenty-three thousand seven hundred dollars, which were utterly fictitious and were devised by the defendants Harrington for the fraudulent purposes herein set forth.

Fourteenth. Thereafter and on or about the third day of October, 1902, the defendants John J. Harrington and Dennis A. Harrington, in furtherance of their wrongful and fraudulent scheme aforesaid, caused to be instituted an action in the supreme court of the State of New York against the defendant Sol Sayles Company for the purpose of recovering a judgment against said corporation for

the amount of the said promissory notes and the interest which was alleged to have accrued thereon. The complaint in said action was signed by one Philip J. Britt "as attorney for defendant." In truth and in fact the said Britt had for many years been the attorney and counsel for the defendants John J. Harrington and
56 Dennis A. Harrington, was the attorney and counsel for the defendant Sol Sayles Company, and for the defendant Sayles, Zahn Company.

Fifteenth. The summons and complaint in said action were served on Solomon Sayles, the president of the defendant Sol Sayles Company, in the presence of the defendant John J. Harrington. The said Sayles was ignorant of the contents of the said papers, did not and was unable to read the same on account of his defective eyesight, and at the request of the defendant John J. Harrington, and in reliance upon his promise to attend to the matter, delivered to him the said summons and complaint immediately upon the service thereof and without having had any opportunity to confer with counsel with regard thereto or to take any measure to investigate the subject matter thereof.

Sixteenth. Thereupon the defendant John J. Harrington, well knowing that the said Sayles and the defendant Sol Sayles Company were in utter ignorance of the nature of the said action and for the purpose of carrying out his fraudulent intent aforesaid, omitted to interpose any defence to the said action or to inform the stockholders of the defendant Sol Sayles Company, and particularly the complainants herein, of the institution thereof, and caused the said defendant Sol Sayles Company to default in said action, and thereafter, and on the 28th day of October, 1902, caused a judgment to be entered in the office of the clerk of the county of New York in favor of the defendants John J. Harrington and Dennis A. Harrington and against the defendant Sol Sayles Company for the sum of twenty-seven thousand three hundred and fifth-seven and 26/100 dollars, and immediately thereafter caused to be issued to the sheriff of the county of New York an execution directing the said sheriff to collect the
57 amount of said judgment out of the property and assets of the defendant Sol Sayles Company, and the sheriff, acting under the instructions of the said defendants John J. Harrington and Dennis A. Harrington and their attorney Philip J. Britt, thereupon and on said 28th day of October, 1902, called upon the aforesaid Milton C. Bradley and demanded of him the delivery of the certificates of stock in the Sayles, Zahn Company which belonged to the defendant Sol Sayles Company, whereupon the said Bradley, acting under the instructions of the defendants John J. Harrington and Dennis A. Harrington and of the said Britt, delivered to the said sheriff certificates representing one thousand shares of the capital stock of the defendant Sayles, Zahn Company belonging to the defendant Sol Sayles Company of the par value of one hundred dollars per share, to wit, certificate No. 8 for five hundred shares; certificate No. 11 for five shares; certificate No. 12 for five shares; cer-

tificate No. 13 for five shares; certificate No. 14 for five shares; certificate No. 15 for four hundred and eighty shares, and also two bonds, each of the par value of one thousand dollars, being consolidated mortgage five per cent. bonds of the New Jersey Steamboat Company, numbered respectively 201 and 202, with thirty-eight coupons of the par value of twenty-five dollars each attached.

Seventeenth. On the 10th day of November, 1902, in furtherance of the aforesaid fraudulent conspiracy, the defendants John J. Harrington and Dennis A. Harrington caused the sheriff of the county of New York to sell all the right, title and interest of the defendant Sol Sayles Company in the aforesaid certificates of stock and bonds and caused the same to be purchased at said sale for their own benefit, and wrongfully and fraudulently concealed from the
58 complainants herein and from the said Solomon Sayles, and from all persons connected with the defendant Sol Sayles Company, other than the defendants Harrington and the aforesaid Nelson and Bradley, the facts aforesaid, and the complainants and the said Solomon Sayles learned of the aforesaid facts for the first time on or about the first day of July, 1904.

Eighteenth. The shares of stock so acquired by the defendants Harrington at the sale aforesaid were at the time of said sale, as the said defendants well knew, and have ever since continued to be, of the value of upwards of two hundred thousand dollars.

Nineteenth. Immediately upon being informed of the aforesaid facts the complainants caused a demand to be made upon the defendants John J. Harrington and Dennis A. Harrington that they transfer the said shares of stock and the said bonds to the defendant Sol Sayles Company, and that they cause to be issued to the complainants herein certificates representing their interests in the said shares of stock, but the said defendants have refused to comply with the said demand and have insisted that the said shares of stock and the said bonds are their personal and individual property, that neither the defendant Sol Sayles Company nor the complainants herein or either of them have any right, title or interest in the said shares of stock or the said bonds or any part thereof.

Twentieth. The complainants were and each of them was a shareholder of the defendant Sol Sayles Company at the time of the transactions herein complained of. This suit is not a collusive one to confer upon a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. The com-
59 plainants are unable to secure any corporate action on the part of the defendant Sol Sayles Company to redress the wrongs hereinbefore set forth, nor are they able to obtain any redress at the hands of the stockholders of the said defendant Sol Sayles Company. The board of directors of said corporation is under the absolute control and domination of the defendant John J. Harrington and the said Harrington, by reason of having possession of a majority of the capital stock of the said corporation, likewise controls the action of the stockholders. Although requested

for information with regard to the facts hereinbefore set forth he has refused to give any information with regard thereto and has declined to redress the wrongs of which complaint is herein made or to give to the complainants any opportunity to lay before the board of directors or the stockholders of the defendant Sol Sayles Company the facts herein set forth.

Twenty-first. The complainants further allege that they greatly fear that the defendants John J. Harrington and Dennis A. Harrington will attempt to dispose of the aforesaid shares of stock and bonds to their injury, and that they will attempt to cause them to be transferred on the books of the defendant Sayles, Zahn Company in such a way as to elude the pursuit of the complainants and in order that the said defendants Harrington may enjoy the fruits of their aforesaid fraud, and that unless restrained and enjoined by this honorable court the defendant Sayles, Zahn Company will permit a transfer of said shares of stock to be made upon its books to the nominees and transferees of the defendants Harrington, all to the irreparable injury of the complainants.

60 Twenty-second. The defendants Harrington and the defendant Sol Sayles Company have failed and refused to account to the complainants with respect to the business and assets of the said corporation since the organization of the defendant Sayles, Zahn Company, and with respect to the dividends earned and paid on the shares of stock in the defendant Sayles, Zahn Company belonging to the defendant Sol Sayles Company and which are now claimed by the defendants Harrington by reason of the fraudulent schemes, devices and acts hereinbefore referred to.

Twenty-third. All of which acts, doings and pretences of the said defendants are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of the complainants in the premises. In consideration whereof and for as much as the complainants are remediless in the premises at and by the strict rules of common law and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable, and to the end that said complainants may have such relief, they humbly pray this honorable court that (1) the judgment obtained by the defendants Harrington against the defendant Sol Sayles Company in the supreme court of the State of New York on the 28th day of October, 1902, be declared fraudulent, null and void, and that the same be vacated and set aside; (2) that the levy and sale under the execution issued on the aforesaid judgment to the sheriff of the county of New York be likewise declared fraudulent, null and void and be vacated and set aside; (3) that the defendants Harrington be required to deliver to the defendant Sol Sayles Company the shares of stock and the bonds so sold under the aforesaid execution, and that thereupon the defendant Sol Sayles Company be required to distribute the said certificates of stock of the defendant Sayles,

61 Zahn Company to the several stockholders of the defendant Sol Sayles Company in accordance with their respective in-

terests therein, to wit, to the complainant Bertha Doctor two hundred shares of said capital stock, to the complainant Katherine Sayles three hundred shares thereof, and the remainder to the remaining stockholders of the defendant Sol Sayles Company; (4) that the defendant Sol Sayles Company account to the complainants for all dividends received by it and to which it was entitled on account of the shares held by it in the Sayles, Zahn Company, and for all of its acts with regard thereto; that the defendants John J. Harrington, Dennis A. Harrington, and each of them, be required to account for all shares of stock of the Sayles, Zahn Company which have come into the possession of them or either of them, for all dividends received thereon or upon any portion of said shares of stock, for the bonds of the New Jersey Steamboat Company, for all interest received on account of said bonds or the coupons attached thereto, for all moneys received and collected from accounts, bills receivable and other assets belonging to the defendant Sol Sayles Company and with respect to the business and affairs of said defendant Sol Sayles Company; (5) that the defendants John J. Harrington, Dennis A. Harrington and Sol Sayles Company, and each of them, and each of their attorneys, agents and the directors, officers, employees and servants of the said corporation be severally restrained and enjoined by both the temporary and permanent decrees of this honorable court, from transferring to any person, firm or corporation, other than to the complainants herein, any of the shares of stock of the Sayles, Zahn Company, or the bonds of the New Jersey Steamboat Company, hereinbefore described, or any interest in the said shares of stock or the said bonds, or
62 in the dividends accruing or accrued thereon, and from in any manner interfering therewith; or any of the six shares of stock of the Sol Sayles Company, or any dividends accruing or accrued thereon, or any interest in such shares of stock or dividends, which were received by the defendant John J. Harrington as hereinbefore alleged; (6) and that the defendant Sayles, Zahn Company and each and every of the officers, directors, agents, employees, servants, attorneys and representatives thereof be enjoined and restrained by both the temporary and permanent decrees of this honorable court, from permitting any of its shares of stock heretofore standing in the name of the Sol Sayles Company, or of the defendants John J. Harrington, Dennis A. Harrington, John P. Nelson or Milton C. Bradley, to be transferred to any person, firm or corporation until the further decree of this honorable court in the premises; that they may have not only the writ of injunction of this honorable court, but also that a writ of subpœna be granted directed to the defendants hereinbefore named, requiring them and each of them to appear on a certain day therein to be named before this honorable court, then and there full, true and direct answers to make to all and singular the premises, but not under oath, which is hereby expressly waived, and further to perform and abide by such further order or decree as to the court may seem meet; that the complainants may

have such other and further relief as may be equitable, just and proper in the premises.

And the court further certifies, that upon the said bill of complaint and the defendants' motion to dismiss the same, this court sustained said application to dismiss, and entered a decree of dismissal in accordance therewith, holding that it appeared from the said bill of complaint that there was no such diversity of citizenship between the parties complainant and
63 defendant as would confer jurisdiction upon the United States circuit court for the southern district of New York in this cause within the meaning of the United States Revised Statutes, and that in arranging the parties to this cause relatively to the controversy the Sol Sayles Company must be grouped on the side of the complainants, with the result that citizens of the same State would thus be parties on both sides of the litigation, and thus deprive this court of jurisdiction.

The court further certifies that the amount involved in the controversy which is the subject matter of this cause was in excess of two thousand dollars, exclusive of interest and costs.

Done this 23d day of December, 1904.

E. HENRY LACOMBE, U. S. C. J.

(Endorsed:) United States circuit court, southern district of New York.—Bertha Doctor and another, complainants, against John J. Harrington and others, defendants.—Certificate of question of jurisdiction on appeal.—Guggenheimer, Untermyer & Marshall, sol'rs for complainants, No. 30 Broad St. city of New York. U. S. circuit court, southern district of New York. Filed Dec. 23, 1904. John A. Shields, clerk.

64 In the Circuit Court of the United States for the Southern District of New York.

BERTHA DOCTOR and KATHERINE SAYLES, Complainants, *against* JOHN J. HARRINGTON, DENNIS A HARRINGTON, Sol Sayles Company, and Sayles, Zahn Company, Defendants.	Petition on Appeal.

The above named complainants, in the above entitled cause, Bertha Doctor and Katherine Sayles, conceiving themselves aggrieved by an order and decree made and entered by this court in the above entitled cause on the 16th day of December, 1904, wherein and whereby it was ordered and decreed that this action be dismissed for the reason that the court has no jurisdiction thereof, hereby desire to appeal to the Supreme Court of the United States from said decree, and therefore pray that this their petition for such

appeal may be allowed, and that the transcript of record, proceedings and papers upon which the aforesaid order and decree was made, may be sent duly authenticated, to the Supreme Court of the United States.

Dated, December 22d, 1904.

BERTHA DOCTOR,
KATHERINE SAYLES,
By GUGGENHEIMER, UNTERMYER & MARSHALL,
Solicitors for Complainants.

(Endorsed:) United States circuit court, southern district of New York.—Bertha Doctor, and another, complainants, against John J. Harrington and others, defendants.—Petition on appeal.—Guggenheimer, Untermyer & Marshall, sol'rs for complainants, No. 30 Broad street, city of New York.—U. S. circuit court, southern district of New York. Filed Dec. 23, 1904. John A. Shields, clerk.

65 In the Circuit Court of the United States for the Southern District of New York.

BERTHA DOCTOR and KATHERINE SAYLES, Defendant, *against* JOHN J. HARRINGTON, DENNIS A. HARRINGTON, Sol Sayles Company, and Sayles, Zahn Company, Defendants.	Order Allowing Appeal.

The above named complainants, Bertha Doctor and Katherine Sayles, having presented their petition, asking leave to appeal to the Supreme Court of the United States from the order and decree entered in this action on the 16th day of December, 1904, dismissing this cause for the reason that the court had no jurisdiction thereof,

Now, on motion of Guggenheimer, Untermyer & Marshall, solicitors and counsel for the complainants,

It is ordered, that an appeal to the Supreme Court of the United States, from the order and decree heretofore filed and entered herein, dismissing the bill of complaint herein, on the ground of want of jurisdiction, be and the same is hereby allowed, and that the certified transcript of the record, and of all proceedings herein, be forthwith transmitted, duly authenticated, to the Supreme Court of the United States; and it is further

Ordered, that the bond on appeal be fixed at the sum of two hundred and fifty dollars, as a bond for costs and damages on appeal.

Dated, December 23, 1904.

E. HENRY LACOMBE, U. S. C. J.

66 (Endorsed:) United States circuit court, southern district of New York.—Bertha Doctor and another, complainants *vs.* John J. Harrington and others, defendants.—Order allowing appeal.—Guggenheimer, Untermyer & Marshall, sol'rs for complainants, No. 30 Broad St. city of New York.—U. S. circuit court, southern district of New York. Filed Dec. 23, 1904. John A. Shields, clerk.

67 In the Circuit Court of the United States for the Southern District of New York.

BERTHA DOCTOR and KATHERINE SAYLES, Complainants, *against* JOHN J. HARRINGTON, DENNIS A. HARRINGTON, Sol Sayles Company, and Sayles, Zahn Company, Defendants. } Assignment of Errors.

Come now the complainants in the above entitled cause and assign errors in the decision and decree of the circuit court of the United States, second circuit, southern district of New York, in the above entitled cause, as follows:

First. The court erred in dismissing the said cause, and in entering the decree in favor of the defendants, dismissing the said cause.

Second. The court erred in holding that it had no jurisdiction of this cause on the ground that there was no such diversity of citizenship of the parties thereto as is required by the provisions of the United States Revised Statutes.

Third. The court erred in holding that it had no jurisdiction of this cause for the reason that in arranging the parties relatively to the controversy the Sol Sayles Company was to be grouped on the side of the complainants with the result of bringing citizens of the same State on both sides of the litigation, and thus depriving this court of jurisdiction.

In order that the foregoing assignments of error may be and appear of record, the complainants present the same to the court,
68 and pray that such disposition be made thereof as in accordance with the law and statutes of the United States in such cases made and provided, and the complainants pray a reversal of the decretal order and decree of dismissal made and entered by said court.

GUGGENHEIMER, UNTERMYER & MARSHALL,
Solicitors for Complainants.

(Endorsed:) United States circuit court, southern district of New York.—Bertha Doctor and another, complainants, against John J.

Harrington and others, defendants.—Assignment of errors.—Guggenheimer, Untermyer & Marshall, sol'rs for complainants, No. 30 Broad St. city of New York.—U. S. circuit court, southern district of New York. Filed Dec. 23, 1904, John A. Shields, clerk.

69 In the Circuit Court of the United States for the Southern District of New York.

BERTHA DOCTOR and KATHERINE SAYLES, Complainants,
against
JOHN J. HARRINGTON, DENNIS A. HARRINGTON, SOL SAYLES Company, and Sayles, Zahn Company, Defendants. } Bond.

Know all men by these presents: that we, Bertha Doctor and Katherine Sayles, as principals, and the United States Fidelity & Guaranty Co. as surety, are held and firmly bound unto John J. Harrington, Dennis A. Harrington, Sol Sayles Company and Sayles, Zahn Company, in the full and just sum of two hundred and fifty dollars, to be paid to the said John J. Harrington, Dennis A. Harrington, Sol Sayles Company and Sayles, Zahn Company, their attorneys, executors, administrators and assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 22nd day of December, nineteen hundred and four.

Whereas, lately, at a session of the circuit court of the United States, second circuit, southern district of New York, in a suit pending in said court between the said Bertha Doctor and Katherine Sayles, complainants, and John J. Harrington, Dennis A. Harrington, Sol Sayles Company and Sayles, Zahn Company, defendants, an order or decree was rendered against the said Bertha Doctor and Katherine Sayles, dismissing the bill of complaint herein on the ground of lack of jurisdiction, and the said complainants having obtained from the said court an order allowing an appeal to
70 the Supreme Court of the United States, to reverse the aforesaid order and decree, and a citation directed to the said John J. Harrington, Dennis A. Harrington, Sol Sayles Company, and Sayles, Zahn Company, is about to be issued citing and admonishing them to be and appear at the Supreme Court of the United States to be holden at the city of Washington, District of Columbia.

Now the condition of the above obligation is such that if the said Bertha Doctor and Katherine Sayles shall prosecute their said appeal to effect; and shall answer all damages and costs that may be awarded against them, if they fail to make their appeal good, then

the above obligation to be void, otherwise to be in full force and effect.

BERTHA DOCTOR. [SEAL.]
KATHERINE SAYLES. [SEAL.]
[SEAL.] THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By SYLVESTER J. O'SULLIVAN, Manager.

Attest:
GEORGE E. HAYES,
Attorney in Fact.

STATE OF NEW YORK, } ss:
County of New York, }

I certify, that on this 22nd day of December, 1904, before me personally appeared the above named Bertha Doctor and Katherine Sayles, to me known and known to me to be the individuals described in and who executed the above bond, and they severally acknowledged to me that they executed the same.

GEO. P. FERGUSON,
[SEAL.] Notary Public, New York County.

The sufficiency of the foregoing bond and the sureties thereon is hereby approved, this 23rd day of December, 1904.

E. HENRY LACOMBE, U. S. C. J.

71 Affidavit, Acknowledgement and Justification by the United States Fidelity and Guaranty Company.

(Cut.)

STATE OF NEW YORK, } ss:
County of New York, }

Before me personally came Sylvester J. O'Sullivan, known to me to be the manager of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Bertha Doctor and ano., as surety thereon, who being by me duly sworn, deposes and says that he resides in the city of New York, State of New York, and that he is the manager of said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Bertha Doctor

& ano., is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like order and authority as manager of said company; and that he is acquainted with George E. Hayes, and knows him to be attorney in fact of said company; and that the signature of said George E. Hayes, subscribed to said bond is the genuine handwriting of said George E. Hayes, and was thereto subscribed by order and authority of said board of directors, and in the presence of said deponent; and that the assets of said company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of
72 one million dollars ($1,000,000.00).

SYLVESTER J. O'SULLIVAN.

Sworn to, acknowledged before me, and subscribed in my presence this 22nd day of December, 1904.

[SEAL.]

VINCENT J. BOYLE,
Notary Public, New York County.

(Endorsed:) United States circuit court, southern district of New York.—Bertha Doctor, and another, complainants, against John J. Harrington and others, defendants.—Bond.—Guggenheimer, Untermyer & Marshall, sol'rs for complainants, No. 30 Broad St., city of New York.—U. S. circuit court, southern district of New York. Filed Dec. 23, 1904. John A. Shields, clerk.

73 The President of the United States to John J. Harrington, Dennis A. Harrington, Sol Sayles Company, and Sayles, Zahn Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, District of Columbia, within thirty days from the date of this writ, pursuant to an appeal filed in the clerk's office of the circuit court of the United States, second circuit, southern district of New York, wherein Bertha Doctor and Katherine Sayles are the complainants, and you are the defendants, to show cause, if any there be, why the order and decree in the said appeal mentioned should not be corrected and speedy justice should not be done the parties in that behalf.

Witness, Honorable E. Henry Lacombe, judge of the circuit court of the United States, second circuit, southern district of New York, this 23rd day of December, nineteen hundred and four, and of the Independence of the United States the one hundred and twenty-ninth.

E. HENRY LACOMBE, U. S. C. J.

Service of the foregoing citation on appeal, admitted by copy at the city of New York, southern district of New York, this 23rd day of December, 1904.

PHILIP J. BRITT,
Solicitor for Defendants Harrington.
ROBERT O'BYRNE,
Solicitor for Sayles, Zahn Co.

74 U. S. Circuit Court, Southern District of New York.

BERTHA DOCTOR and KATHERINE SAYLES, Complainants,
ag'st
JOHN J. HARRINGTON, DENNIS A. HARRINGTON, SOL SAYLES COMPANY, and Salyes, Zahn Company, Defendants.

Affidavit of Service.

STATE OF NEW YORK, County of New York, } *ss:*

Mark Trautfield of the county of New York, being duly sworn, says that he is over twenty-one years of age, and that on the 28th day of December, in the year one thousand nine hundred and four he served a copy of the annexed citation on The Sol Sayles Company one of the defendants in this action, by delivering the same to John T. Nelson its secretary at No. 615 West 59th St.

MARK TRAUTFIELD.

Sworn to before me this 28th day of December, 1904.

[SEAL.] RAPHAEL BRILL,
Notary Public, No. 236, New York County.

(Endorsed:) United States circuit court, southern district of New York.—Bertha Doctor and another, complainants, against John J. Harrington and others, defendants.—Citation.—Guggenheimer, Untermyer & Marshall, sol'rs for complainants, No. 30 Broad street, city of New York.—U. S. circuit court, southern district of New York, Filed Dec. 24, 1904, John A. Shields, clerk.

75 UNITED STATES OF AMERICA, Southern District of New York, } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to seventy-four inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the cause en-

titled Bertha Doctor and Katherine Sayles, complainants, against John J. Harrington, Dennis A. Harrington, Sol Sayles Company and Sayles, Zahn Company, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 30th day of December, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States the one hundred and twenty-ninth.

[Seal of U. S. Circuit Court, Southern Dist. New York.]

JOHN A. SHIELDS, Clerk.

Endorsed on cover: File No. 19,577. S. New York C. C. U. S Term No. 477. Bertha Doctor and Katherine Sayles, appellants, *vs.* John J. Harrington, Dennis A. Harrington, Sol Sayles Company, and Sayles, Zahn Company. Filed December 31st, 1904. File No. 19,577.

UNITED STATES SUPREME COURT,

OCTOBER TERM, 1904.

BERTHA DOCTOR and KATHERINE SAYLES,
Appellants,

against

JOHN J. HARRINGTON, DENNIS A. HARRINGTON, SOL SAYLES COMPANY and SAYLES, ZAHN COMPANY,
Appellees.

No. 477.

Appeal from the Circuit Court of the United States for the Southern District of New York, Second Circuit.

Appellants' Argument.

This action was brought by the appellants, as stockholders of the Sol Sayles Company, a corporation organized under the laws of the State of New York, for the purpose of vacating and setting aside a judgment obtained by the appellees Harrington against the Sol Sayles Company in the Supreme Court of the State of New York, on October 28, 1902, and the levy and sale under an execution issued thereunder, and of requiring the appellees

Harrington to deliver to the Sol Sayles Company certain shares of stock in the Sayles, Zahn Company, and certain bonds, belonging to the Sol Sayles Company, which had been sold under such execution, and for other equitable relief (Record, pages 7 & 9).

In substance, the complainants allege in their bill of complaint that they are citizens of Morris County, New Jersey; that the defendants Harrington are citizens of the State of New York, and that the defendants Sol Sayles Company and Sayles, Zahn Company are likewise citizens of said State, both being incorporated under the laws of that State; that the Sol Sayles Company was organized with a capital stock of $100,000, divided into 1,000 shares of the par value of of $100 per share, of which the complainants owned 500 shares, and the defendants Harrington 500 shares; that by an arrangement made between the owners of the stock, the voting power on a majority thereof was given to the defendant John J. Harrington, who directed the management of the affairs of the corporation, dictated its policy, and selected its directors; that on January 26, 1898, the defendant John J. Harrington caused the defendant Sayles, Zahn Company to be organized, for the purpose of taking over the business of the defendant Sol Sayles Company and of one Henry Zahn, and thereupon the property of the Sol Sayles Company and of Zahn were transferred to the Sayles, Zahn Company, which likewise was controlled by the defendant John J. Harrington; that the Sol Sayles Company received in consideration of the transfer of its property, $50,000 of the capital stock of the Sayles, Zahn Company, and subsequently subscribed for $50,000 additional stock (Record, pp. 3 & 4).

It is further alleged that about February 1, 1899, the defendants Harrington, for the purpose of

cheating and defrauding the Sol Sayles Company, and the complainants, of their interest in the assets of the Sayles, Zahn Company, fraudulently caused the Sol Sayles Company to execute and deliver to them, without any consideration whatsoever, its promissory notes aggregating $23,700, which were utterly fictitious, and thereafter, and on October 3, 1902, the defendants Harrington, in furtherance of their fraudulent scheme, caused an action to be instituted and a judgment to be recovered against the Sol Sayles Company, for the amount of the said promissory notes and interest which was alleged to have accrued thereon, the Sol Sayles Company being in utter ignorance of the nature of the action and omitting to interpose any defence thereto (Record, pp. 4 & 5).

This scheme resulted in the recovery of a judgment against the defendant Sol Sayles Company on October 28, 1902, for $27,357.26, in favor of the defendants Harrington, who thereupon caused an execution to be issued to the Sheriff of the County of New York, against the property and assets of the Sol Sayles Company, under which execution the said Sheriff levied on the shares of stock in the Sayles, Zahn Company, and also two bonds of the New Jersey Steamboat Company, which belonged to the Sol Sayles Company, and sold all of the right, title and interest of the Sol Sayles Company in the said certificates of stock and in the said bonds, the said defendants Harrington causing them to be purchased for their own benefit; said shares of stock being then, as the defendants Harrington well knew, and have ever since continued to be, worth upwards of $200,000 (Record, pp. 6 & 7).

It is further alleged that the complainants caused a demand to be made upon the defendants Harrington, that they transfer the said shares of

stock and the said bonds to the Sol Sayles Company, but that they have refused to do so, and have insisted that these shares of stock and bonds are their personal and individual property, and that neither the Sol Sayles Company nor the complainants have any right, title or interest in either the said shares of stock or the said bonds, or any part thereof (Record, p. 7).

The twentieth paragraph of the bill of complaint (p. 7) is as follows:

"The complainants were and each of them was a shareholder of the defendant Sol Sayles Company at the time of the transactions herein complained of. This suit is not a collusive one to confer upon a Court of the United States jurisdiction of a case of which it would not otherwise have cognizance. The complainants are unable to secure any corporate action on the part of the defendant Sol Sayles Company to redress the wrongs hereinbefore set forth, nor are they able to obtain any redress at the hands of the stockholders of the said defendant Sol Sayles Company. The Board of Directors of said corporation is under the absolute control and domination of the defendant John J. Harrington and the said Harrington, by reason of having possession of a majority of the capital stock of the said corporation, likewise controls the action of the stockholders. Although requested for information with regard to the facts hereinbefore set forth, he has refused to give any information with regard thereto, and has declined to redress the wrongs of which complaint is herein made or to give to the complainants any opportunity to lay before the Board of Directors or the stockholders of the defendant Sol Sayles Company the facts herein set forth."

After issue was joined in this suit, and notice was given for the taking of depositions, the defendants moved, at a term of the United States Circuit Court for the Southern District of New York held by Hon. E. Henry Lacombe, Circuit Judge, for a

dismissal of the bill of complaint, on the ground that the said Court lacked the necessary jurisdiction to entertain the suit, and thereupon a decision was rendered dismissing the bill for lack of jurisdiction, and a decree was entered accordingly (Rec., p. 26).

An appeal to this Court was thereupon allowed, and a certificate as to the question of jurisdiction involved in the aforesaid decision was duly made in accordance with the provisions of Section 5, Chapter 517, of the Act of March 3, 1891. The ground of decision stated in said certificate, is as follows:

"That it appeared from the said bill of complaint that there was no such diversity of citizenship between the parties complainant and defendant as would confer jurisdiction upon the United States Circuit Court for the Southern District of New York in this cause within the meaning of the United States Revised Statutes, and that in arranging the parties to this cause relatively to the controversy the Sol Sayles Company must be grouped on the side of the complainants, with the result that citizens of the same State would thus be parties on both sides of the litigation and thus deprive this Court of jurisdiction" (Rec., p. 36).

The appellants' assignments of error are as follows:

First.—The Court erred in dismissing the said cause and in entering a decree in favor of the defendants dismissing the cause.

Second.—The Court erred in holding that it had no jurisdiction of this cause on the ground that there was no such diversity of citizenship of the parties thereto as is required by the provisions of the United States Revised Statutes.

Third.—The Court erred in holding that it had

no jurisdiction of this cause, for the reason that in arranging the parties relatively to the controversy the Sol Sayles Company was to be grouped on the side of the complainants, with the result of bringing citizens of the same State on both sides of the litigation and thus depriving this Court of jurisdiction (Record, p. 38).

The two propositions upon which the appellees have relied to defeat the jurisdiction of the Federal Court in this cause, are as follows:

(1) That this suit cannot be maintained in the Federal Courts, because there is no such diversity of citizenship between the complainants and the defendants as is required under the Federal Statutes, it being argued that the complainants, who sue as stockholders of the Sol Sayles Company, are, by an irrebuttable presumption, deemed citizens of the State of New York, under the laws of which State the Sol Sayles Company was organized, and of which State, all of the other defendants are citizens.

(2) That this suit, being a derivative action, in which the complainants are suing solely for the benefit of the Sol Sayles Company, a New York corporation, that corporation, although in form a defendant, is in legal effect on the same side of the controversy as the complainants, and since the Sol Sayles Company is a citizen of the same State as the remaining defendants, the Federal Courts have no jurisdiction, inasmuch as the suit does not involve a controversy between citizens of different States.

The appellants contend, that although there is apparent logic in support of these propositions, the decisions of this Court, so far as they touch the subject, do not sustain them.

ARGUMENT.

I.

There is a diversity of citizenship between the complainants and the defendants, the former being citizens of New Jersey and the latter of New York.

It is true that the complainants are stockholders of the Sol Sayles Company, that their sole right to seek redress from the wrongs complained of is a derivative one, based on the allegations that a fraud has been perpetrated on the Sol Sayles Company, and that unless relief could be afforded to that corporation, had it instituted this action, the complainants would have no standing in Court.

It is none the less true, that the complainants, as individuals, are in fact citizens of New Jersey, and not of New York, the State under whose laws the corporation of which they are stockholders was organized.

The defendants contend, that whatever the fact may be, the complainants are estopped or debarred from asserting such fact by reason of the decisions of this Court in *Louisville &c. R. R.* v. *Letson, 2 How. U. S., 497, 558; Marshall* vs. *Baltimore and Ohio R. R. Co., 16 How., 325; St. Louis & San Francisco Railway Co.* v. *James, 161 U. S., 545; Barrow Steamship Co.* v. *Kane, 170 U. S., 100; Southern Railway Co.* v. *Allison, 190 U. S., 326,* and many other cases in which it has been held, that for the purpose of conferring jurisdiction upon the Federal Courts over a corporation, there is a conclusive presumption of law that all of the stockholders of such corporation are citizens of

the State in which the corporation was organized, and that this presumption is irrebuttable, and cannot be defeated by allegations or evidence to the contrary.

It is therefore argued, that if all of the stockholders of a corporation, are to be absolutely and conclusively presumed, as a matter of law, to be citizens of the State in which the corporation was organized, in order to confer jurisdiction over the corporation, that presumption cannot, in the same suit, be disregarded, in order to enable a stockholder of such corporation, to maintain a derivative action in the right of that corporation against it, and other defendants.

On its face, this would seem to be good reasoning; but it is based entirely on a legal fiction, which has been indulged for the purpose of enabling the Federal Courts to exercise jurisdiction over corporations. Legal fictions, however, are not always carried out to their logical conclusion, and this Court has entertained jurisdiction in numerous instances, where precisely the same state of facts existed, as in the present case. Among the more important precedents are the following:

Dodge v. *Woolsey, 18 How., 331.*
Hawes v. *Oakland 104 U. S., 450.*
Quincy v. *Steel, 120 U. S., 241.*
Pollock v. *Farmers L. & T. Co., 157 U. S., 429.*
Cotting v. *Kansas City Stock Yard Co., 183 U. S., 79.*

Moreover, if this Court had considered the proposition now urged as sound, it would not have been necessary for it to promulgate the 94th Rule in Equity, which was done on January 23, 1882, at the time of the rendition of the decision in

Hawes v. *Oakland* (*supra*). That rule is as follows:

"Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a Court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

This rule apparently recognizes the jurisdiction of the Federal Courts, over suits by stockholders, suing in the right of the corporation, so long as there is no collusion for the purpose of giving jurisdiction to the Federal Courts.

It was argued in the Court below, that in *Dodge* v. *Woolsey*, *Pollock* v. *Farmers Loan & Trust Company* and *Cotting* v. *Kansas City Stock Yard Company* (*supra*), Federal questions were involved which would have conferred jurisdiction on the Federal Courts, irrespective of diversity of citizenship, but it will be observed that in these cases jurisdiction was claimed on the ground of diversity of citizenship.

It is likewise true, that in *Hawes* v. *Oakland* and *Quincy* v. *Steel* (*supra*), relief was refused to the complainants, but such refusal was not based on the ground now urged to defeat Federal jurisdiction.

Attention is further called to the recent decision in *Utah-Nevada Co.* vs. *De Lamar*, 133 *Fed. Rep.*, 113.

II.

Even though the complainants are seeking to maintain this action in the right of the Sol Sayles Company, in view of the trend of authority that fact is not entitled to weight as against the circumstances that the Sol Sayles Company is in fact a defendant.

It is doubtless true, as was contended in the Court below, that in arranging the parties relatively to the controversy between them the mere form of pleading is frequently set aside and the parties are placed on different sides of the matter in dispute according to the facts, and when upon such an arrangement it appears that citizens of the same State appear on both sides of the controversy, it is not within the jurisdiction of the Federal Courts.

It is sought to apply this rule to the present case. It was equally applicable to the cases considered under the last point, but it was not done.

This was treated as an important consideration in the Circuit Court of Appeals for the Second Circuit, in *De Neufville* v. *New York and Northern Railway Company, 81 Fed. Rep., 10, 13,* where the Court said of a similar case:

"It is the property of the corporation which has been taken, and it is the corporation which is entitled to its return, or to an accounting for its proceeds. When the corporation succeeds, complainant's share of stock will be worth more; and to that extent he has an interest in the result, which the Courts have recognized to the extent of allowing a dissatisfied stockholder, upon a sufficient showing of unsuccessful efforts to induce action by the officers of the corporation, himself

to bring the cause of action before the Court for consideration. But, in whatever form or under whatever name it is presented, it is the cause of action of the corporation, and of the corporation alone. The real controversy is between the corporation, whose officers refuse to assert its rights, and the alleged conspirators, who have deprived it of its property. If the wholesome rule approved by the Supreme Court in numerous decisions were followed, and the parties arranged, not as they stand in the title, but according to their interest in the controversy, we would have the New York and Northern Railway Company classified as a plaintiff, and the diversity of citizenship necessary to confer jurisdiction would no longer exist. If the Circuit Courts were entirely free to enforce the provisions of the fifth section of the Act of 1875 to every case where it logically applies, they would, no doubt, be able to relieve their dockets as was suggested in Hawes *v.* Oakland, 104 U. S., 450, of many cases which have no proper place there; but the decisions in Dodge *v.* Woolsey, 18 How., 331; Hawes *v.* Oakland (*supra*), and Quincy v. Steel, 120 U. S., 241, and the 94th Rule in Equity, seem to preclude a strict application in cases such as the one at bar, of the rule that parties may be rearranged according to their interest in the controversy."

III.

It is submitted that the decree appealed from should be reversed, with costs.

CHARLES A. HESS,
Appellants' Counsel.

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FILED
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Supreme Court of the United States.

October Term, 1904. No. 477.

BERTHA DOCTOR AND KATHARINE SAYLES,

Appellants,

against

JOHN J. HARRINGTON, DENNIS A. HARRINGTON, SOL SAYLES COMPANY, AND SAYLES ZAHN COMPANY,

Appellees.

Brief and Argument for Appellees.

GEORGE H. YEAMAN,

Of Counsel for Appellees.

WEIBEZAHL PRINT, 85 Liberty St., N. Y. Telephone 3240 John.

Supreme Court of the United States.

OCTOBER TERM, 1904.

BERTHA DOCTOR and KATHERINE SAYLES, Appellants, AGAINST JOHN J. HARRINGTON, DENNIS A. HARRINGTON, SOL SAYLES COMPANY and SAYLES ZAHN COMPANY, Appellees.	No. 477.

BRIEF AND ARGUMENT FOR APPELLEES.

The legal question certified to this Court is whether the complainants' bill showed such diversity of citizenship between the parties complainant and parties defendant as would confer jurisdiction upon the Court below.

The complainants allege that they are citizens of the State of New Jersey and owners of shares of the stock of the Sol Sayles Company; that the defendants, John J. Harrington and Dennis A. Harrington, are citizens of New York, and that the Sol Sayles Company and the Sayles Zahn Company are

corporations created under the laws of New York and are citizens of New York.

The bill then proceeds to state certain alleged wrongful acts on the part of John J. and Dennis A. Harrington, and the Sayles Zahn Company, by which the Sol Sayles Company suffered great pecuniary loss and damage.

The facts alleged need not be repeated in detail here, because counsel for appellants, in his brief, frankly and properly admits that the cause of action stated is derivative (Brief, p. 7), that the action is for the benefit of the Sol Sayles Company, that they "are seeking to maintain this action in the right of the Sol Sayles Company" (Brief, p. 10). The brief further admits "that unless relief could be afforded to that corporation, had it instituted this action, the complainants would have no standing in Court." (Brief, p. 7.)

If counsel for appellees could believe that this statement was deliberately penned with reference to the sole question of *jurisdiction* now under consideration, they would not deem any argument for appellees necessary; for very clearly the Sol Sayles Company could have obtained no relief had it instituted *this action*. But as the statement was probably intended to refer to a recovery on the *merits* by the Sol Sayles Company on the same cause of action in a Court of *competent jurisdiction*, it is only proper to accept it as being, that far, a correct statement of the law.

We submit the following points in argument:

I.

THE MEMBERS AND STOCKHOLDERS OF A CORPORATION ARE INDISPUTABLY PRESUMED, IN A CASE AS THE ONE AT BAR, TO BE CITIZENS OF THE STATE, UNDER WHOSE LAWS THE CORPORATION WAS ORGANIZED.

The plaintiffs allege themselves to be stockholders of the Sol Sayles Company, a corporation created and organized under the laws of New York and a citizen of New York. Stockholders, members of a corporation, are conclusively presumed to be citizens of the State which created the corporation, called it into life, gave to it its being as an artificial, legal entity.

> *Thomas vs. Board of Trustees of Ohio State University.* (No. 43. October Term, 1904, and cases cited.)

By this plea of a New Jersey residence, complainants seem to have sought to execute a somewhat clever move in their game of litigation by which they might transfer themselves and their cause of action from the State Courts, where they rightfully belong, into the United States Courts, where they do not belong and where they have no proper standing.

In the attempt so to do, however, they are met by the presumption of law which the courts have repeatedly declared to be irrebuttable and indisputable, viz.: That the members of a corporation, *i. e.*, its stockholders, must be regarded as citizens of the same State as the corporation itself.

This presumption is sustained by abundant authority of a character and long standing not now to be successfully challenged. See

Louisville, etc., R. R. Co. v. Letson, 2 How. U. S., 497, 558;

St. Louis & San Francisco Ry. Co. v. James, 161 U. S., 545;

Barrow S. S. Co. v. Kane, 170 U. S., 100;

Southern Ry. Co. v. Allison, 190 U. S., 326;

Carter on the Jurisdiction of the Federal Courts as limited by the Citizenship and Residence of the parties at p. 197.

Covington Drawbridge Co. v. Shepherd, 20 How., at p. 232.

Muller v. Dows, 94 U. S., 444;

Foster on Fed. Pr., Vol. 1, Sec. 19.

It is contended on behalf of appellants that this presumption has been raised and acted upon merely so far as it affects jurisdiction *over corporations*, as distinguished from their members; and that it cannot, and was not intended to be applied to the citizenship *in fact*, of such members or stockholders. There may be cases in which a stockholder, citizen of one State, has sued his corporations, a citizen of another State, in the Courts of the United States, cases in which jurisdiction depended on diversity of citizenship. But the question was not raised. It passed *sub silentio*.

The presumption that stockholders are citizens of the State which created their corporation is the foundation of the presumption that the corporation is a citizen of that State, a conclusion which gives it a status as a citizen for jurisdictional purposes. It is impossible that an artificial legal entity can be a citizen in any other sense. The presumption

having been established to avoid infinite confusion and absurdity in questions of jurisdiction, ought to support not only the citizenship of the corporation, but, for the same jurisdictional purposes should equally support the co-citizenship of the corporation and the individual, natural persons who are the component members, the stockholders of the corporation, the legal entity.

In *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545 (40 L. Ed. 802), this Court was asked to rule that, having held a corporation to be a citizen of the State creating it, the Court should go further and hold that when that corporation is authorized by the law of another State to do business therein, and for that purpose to be endowed with all the powers and privileges of a domestic corporation, it should be deemed a citizen of that other State also. But the Court refused to extend the rule so far. Manifestly such an extension would create about as much confusion, absurdity and injustice as was avoided by the rule as originally adopted.

We do not suggest that the Court should hold that, because, for jurisdictional purposes, corporators are now held to be citizens of the same State with their corporation, therefore they should be held to be such for all purposes, even in contests with other corporations or with private persons. To say nothing of constitutional difficulties, the inconvenience, injustice and absurdity would be as great as those which were removed and overcome by the original presumption. But we do insist that not merely logical consistency, but the substantial reason of the thing requires that the rule should apply to and govern the relations between a corporation and its constituent members in cases like

the one at bar. What more appropriate tribunals exist, either for punishing corporations or protecting their rights than the Courts of the States which have created them? The rule now contended for would cut up by the roots the abuses so trenchantly described in the Contra Costa (Oakland) Water Co. case. (14 Otto, 450.)

In *Thomas vs. Board of Trustees of Ohio State University*, the Court says: "For the purpose of *suing* and being sued in a Circuit Court of the United States the *members* of a local corporation are *conclusively presumed* to be citizens of the State by whose laws it was created and in which alone the corporate body has a legal existence."

This is broader than the usual statement that for the purpose of jurisdiction a corporation will be conclusively presumed to be a citizen of the State by whose laws it was created. The presumption as stated in Thomas v. Trustees is a necessary and indispensable premise upon which to base the deduced presumption of the citizenship of the corporation itself, and the rule, as there stated, would give full reciprocal action to the reasoning on which the presumption is based. It thus extends, and only extends, to the legal relations between the company and its members in cases like this. It would not interfere with the general rights and privileges incident to citizenship.

II.

IF THE PRESUMPTION OF CITIZENSHIP DISCUSSED IN THE FOREGOING POINT BE HELD REBUTTABLE, BY AVERMENT AND PROOF TO THE CONTRARY, THEN, NO MATTER HOW THE PLEADER HAS ARRANGED THE PARTIES, THE COURT WILL ALIGN THEM ACCORDING TO THEIR REAL RIGHTS AND INTERESTS, TO ASCERTAIN WHETHER THE REAL CONTROVERSY IS BETWEEN CITIZENS OF DIFFERENT STATES.

A stockholder's suit may be brought against the stockholder's company and other persons or corporations, to restrain doing an act that would result in direct and not consequential injury *to the stockholder*. In such a case, the corporation has no right of action, no damage has been done to it, and it could not sue. And so a stockholder's suit may be brought against the corporation and other parties to prevent the doing an act that would result in a forfeiture of the corporation's franchise. The company could not sue itself to prevent itself from becoming *felo de se*. Yet such an act would be an injury to the stockholder. It is believed that Rule 94 does not apply to such cases.

Whether, in such cases, the allegation of actual diversity of citizenship would sustain jurisdiction, or the presumption of co-citizenship of a corporation and its members would overcome the allegation and defeat jurisdiction, is a question not now before the Court.

The case of Utah-Nevada Co. vs. De Lamar, 133 Fed. Rep., 113, holds that in such a case the presumption does not apply. The case is clearly distinguishable from the one at bar because the suit was upon a cause of action vested in the plaintiff by contract, and had no relation whatever to the *class of actions we are now* considering (pp. 113-114). Moreover, the judgment of the Circuit Court, to which the case had been removed, was reversed upon the ground that that Court had no jurisdiction because the plaintiffs' assignor Blake could not have sued in the Circuit Court (p. 119 et seq), and the Circuit Court was ordered to remand the case to the State Court (p. 124). Therefore, the observations touching the presumption of citizenship may be regarded as obiter.

The case of Hanchett vs. Blair, 100 Fed. Rep., 817, was clearly a direct controversy on a contract between the plaintiff, a stockholder, and his corporation (p. 818-819), and has no relation whatever to the class of cases to which the one now under review belongs.

In other cases, the more common state of facts, third parties are charged with committing acts injurious to the corporation, such as negligently or intentionally wasting or misappropriating its assets. For the purposes of such an action, the corporation is one person, and its officers, trustees or directors are third persons. In all such cases the presumption of co-citizenship should be inexorably applied. Every reason that can be urged for presuming a corporation to be a citizen of the State under whose laws it was created, applies with full force in cases like the one now under review to the citizenship of the members of the corporation.

Other reasons may be named. The *property right* is in the corporation. The *right of action* is in the corporation. The action is for the *benefit* of the corporation. The plaintiff, as a mere stockholder, has less to commend his appeal to the Circuit Court than the assignee of a chose in action has, and he is *expressly excluded*, unless his assignor could have sued. The application of the presumption would entirely remedy the evil and the *frauds on jurisdiction* which led to the adoption of Rule 94.

When such acts have been committed, the right of action vests in the corporation. It is the party primarily entitled to sue. A stockholder has no right of action whatever, in such a case, until his corporation, upon his request, has refused to sue. It is that refusal which gives him the right to go into equity, although the nature of the wrong done would have supported only an action at law by the injured corporation. His right of action is derivative. But the corporation is a necessary party, the suit must be brought for its benefit, and it thus becomes substantially a plaintiff in the case. The stockholder who brings the action would not be allowed to receive a dollar of the money if the bill asked for damages, or for an accounting. The recovery becomes assets of the corporation. Whether *officers*, guilty of participating in the wrong, would be allowed, *as stockholders*, to participate in the distribution of the recovery, has not been decided by this Court, and the question is not now before it.

To maintain such an action in a Circuit Court of the United States, the necessary diversity of citizenship must exist. To ascertain whether such diversity exists, the Court will always align parties according to their interests—according to the substance of the controversy.

When jurisdiction fails, it is the duty of the Court of its own motion, to dismiss.

In *New v. Oklahoma*, decided at October Term, 1904, No. 226, the opinion of the Court concludes with the following statement:

> "Reference is made to Queenan v. Okla-
> "homa 190 U. S. 548 (47 L. Ed. 1175), in
> "which we entertained jurisdiction in the
> "absence of any suggestion as to the want of
> "it."

"*United States v. Simms*, 1 Cranch. 252 (2d L. Ed. 98), is an instance of similar inadvertence, and when cited in *United States v. More*, 3d Cranch. 159, 172, 2d L. Ed. 397, 401, Chief Justice Marshal disposes of it in these words:"

> "No question was made in that case as to
> "the jurisdiction. It passed *sub silentio* and
> "the Court does not consider itself as bound
> "by that case."

In the case at bar the bill, in form, alleges diverse citizenship. But the U. S. Courts have firmly established the policy of looking at the facts to see how the parties are interested, and will align them as plaintiffs or defendants according to that interest or according to the substance of the controversy. This is made a duty under the 5th clause of the Act of 1875. Guided by that rule, there is no difficulty in assigning the New York corporation its proper position on the record, for the purpose of determining the question of jurisdiction. It is the real plaintiff in the action, and is a citizen of the same State with the other defendants.

A short and decisive test in the case at bar is:

Could the Sol Sayles Company have maintained its bill in the same Court on the same cause of action? The inevitable answer is in the negative. The cause of action vested and remains in that company. That company and all the other defendants are alleged by the bill to be citizens of New York. No diversity of citizenship exists as between them. Even in a State Court the action would not be upon any legal right of the plaintiffs. They have none. It would be derivative—based solely upon the fact that the corporation would not sue. But a derivative action must not be allowed to override the inexorable rule of diversity of citizenship as an indispensable requisite to jurisdiction in the Courts of the United States. If the presumption of the co-citizenship of a corporation and its constituent members may be rebutted by averment and proof to the contrary, yet the duty and the power of the Court to align parties according to the facts, according to the substance of the controversy, remains, and the alignment in this case at once places the Sol Sayles Company as plaintiff. The corporation being a citizen of New York, the jurisdiction fails. The corporation is a necessary party. The Court could not proceed without its presence. The suit is for its benefit, and *benefit, interest in the litigation*, is the test in aligning parties.

This conclusion, if not actually required by the language of the statute, is certainly required by its policy and spirit.

> "Nor shall any Circuit Court have cogni-
> "zance of any suit, except upon foreign bills
> "of exchange, to recover the contents of any
> "promissory note or other chose in action
> "in favor of any assignee * * * unless such

> "suit might have been prosecuted in such
> "Court to recover the said contents if no as-
> "signment or transfer had been made."

The plaintiffs occupy a much less favorable position than would an assignee of the Sol Sayles Company. Such an assignee *would hold the legal title*, yet could not sue in the Court in which this suit was brought. The plaintiffs, as mere stockholders, have no title whatever in the assets of the corporation. They assume to enforce its rights, by appealing to a Court that is closed against the company. The State Courts are open to the plaintiffs and to their company. The case well illustrates the evils so forcibly depicted in the Contra Costa (Oakland) case, and illustrates the benefits that would follow the application of the presumption contended for in Point I.

In *St. Louis &c. Railway Co. v. Davis and others*, 132 Fed. Rep., p. 629, the Court, at page 632, says:

> "In determining questions of jurisdiction
> "of the National Courts, there are several
> "well settled rules to govern the Courts.
> "The Act March 3d, 1887, as corrected by
> "Act March 13, 1888, was intended to contract
> "the jurisdiction of the National Courts, and
> "all doubts as to jurisdiction must be re-
> "solved against it."

In *Greel v. United Electric Co.*, 132 Fed. Rep., 252, a removal cause, Judge Lanning has extensively reviewed many of the cases which throw any light upon this subject and concluded by remanding the case to the State Court in which the action had been instituted.

At page 254, the Court says:

> "The New Jersey Company (the plaintiff's "corporation), in the case now under con- "sideration, cannot be considered a merely "formal or immaterial party. It is a neces- "sary and indispensable party—the case "could not proceed without it. The com- "plainant seeks relief in its behalf because "it will not seek it for itself. As it will not "voluntarily act as complainant, the practice "in equity requires that it shall be brought "in as a party defendant. It follows that in "determining the question of jurisdiction, its "citizenship cannot be ignored. But the "mere fact that it stands as a defendant on "the face of the pleadings does not fix its "status in the controversy. That is fixed by "its real relation to the controversy."

The case at bar could not proceed without the presence of the Sol Sayles Company. The complainant seeks relief in its behalf because it will not seek it for itself.

But it is submitted that in the review of the cases the learned Judge was not quite accurate in citing *Dodge v. Woolsey*, 18th How. 331, as a case in which such jurisdiction has been maintained.

The jurisdiction was contested in that case on the contention that Courts of equity as such had no jurisdiction over corporations, which seems at one time to have been a serious question, and upon the further ground that the suit had been improperly brought in the Circuit Court of the United States for the District of Ohio, because it was a contrivance to create a jurisdiction where none fairly existed by substituting an individual stockholder instead of the bank as complainant and making the directors defendants, the stockholder being made complain-

ant because he was a citizen of the State of Connecticut. Upon that branch of the case, the Court remarked:

> "As to the imputation of contrivance, "that is the assertion of a fact which does "not appear in the case, one which the de- "fendants should have proved if they meant "to rely upon it to defeat the complainant's "suit, and not having done so, as they might "have attempted to do, we cannot presume "its existence."

That neither states nor decides the precise question now under consideration. And if it had done so, yet the Circuit Court, in the Groel case, was quite correct in the statement that Dodge v. Wolsey was decided long before the enactment of the statute of 1875. Under Section 5 of that Act, the Court must look behind the place assigned to parties by the pleader and inquire whether such a suit really and substantially involves a dispute or controversy properly within the jurisdiction of the Circuit Court, and, if it does not, must dismiss the suit or, if it has been removed to the Circuit Court, shall remand it to the State Court in which it was commenced.

In the Groel case, the Court states, as one of its conclusions:

> "The rule deduced from them (the author- "ities) is that in a suit in equity instituted "by a stockholder in his own name, but upon "a right of action existing in his corporation, "the stockholder's corporation will be "aligned with the defendants whenever the "officers or persons controlling the corpora- "tion are shown to be opposed to the object "sought by the company's stockholder, and

> "that when such opposition does not appear "the stockholder's corporation will be "aligned with the complainant in the suit." pp. 263-264.

It is submitted that the rule is not fully stated. The stockholder and his corporation must be aligned on the same side whenever it appears, either from the pleadings or the facts proved, that their interests are substantially the same, or that the managers of the corporation are really in sympathy with the stockholder, *or that the corporation will be benefited by the stockholder's success.* In deciding such a question, the fact that the corporation has refused to sue is of no consequence whatever. As pointed out by the Supreme Court, that is often a device to get jurisdiction. The true rule was well stated in *Elkins v. City of Chicago*, 119 Fed. Rep. 957-958 as follows:

> "It is the duty of the Court, for jurisdic- "tional purposes, to ascertain the necessary "parties to the suit and align them upon the "one side or the other in conformity with "their own interests and attitudes, irrespec- "tive of their designations in the bill."

In *Hawes v. Contra Costa Water Co.*, 104 U. S. 450 (26 L. Ed. 827), the Supreme Court went largely into the history of these stockholders' suits, a multiplicity of which had arisen after the decision in Dodge v. Wolsey, 18 How. 331, saying:

> "This practice has grown until the corpor- "tions created by the laws of States bring a "large part of their controversies with their "neighbors and fellow citizens into the "Courts of the United States for adjudica- "tion, instead of the State Courts, which are

"their natural, their lawful and their appro-
"priate forum. It is not difficult to see how
"this has come to pass. A corporation hav-
"ing such a controversy, which it is foreseen
"must end in litigation, and preferring for
"any reason whatever that this litigation
"shall take place in a Federal Court, in
"which it can neither sue its real antagonist
"nor be sued by it, has recourse to a holder
"of one of its shares, who is a citizen of an-
"other State. This stockholder is called into
"consultation and told that his corporation
"has rights which the directors refuse to en-
"force or to protect. He instantly demands
"of them to do their duty in this regard,
"which, of course, they fail or refuse to do,
"and thereupon he discovers that he has two
"causes of action entitling him to equitable
"relief in a Court of Chancery, namely: one
"against his own company, of which he is a
"corporator, for refusing to do what he has
"requested them to do; and the other against
"the party which contests the matter in con-
"troversy with that corporation. These two
"causes of action he combines in an equity
"suit in the Circuit Court of the United
"States, because he is a citizen of a different
"State, though the real parties to the con-
"troversy could have no standing in that
"Court. If no non-resident stockholder ex-
"ists, a transfer of a few shares is made to
"some citizen of another State, who then
"brings the suit. The real defendant in this
"action may be quite as willing to have the
"case tried in the Federal Court as the cor-
"poration, and its stockholder. If so, he
"makes no objection, and the case proceeds
"to a hearing. Or he may file his answer de-
"nying the special grounds set up in the bill
"as a reason for the stockholders' inter-
"ference, at the same time that he answers to

"the merits. In either event, the whole case "is prepared for hearing on the merits, the "right of the stockholder to a standing in "equity received but little attention, and the "overburdened courts of the United States "have this additional important litigation "imposed upon them by a simulated and con-"ventional arrangement, unauthorized by "the facts of the case or by the sound princi-"ples of equity jurisdiction."

The Court, referring to the Statute of 1875, says:

"And this same statute, while enlarging "the jurisdiction of the Circuit Courts in "cases fairly within the constitutional grant "of power to the Federal Judiciary, strikes a "blow, by its fifth section, at improper and col-"lusive attempts to impose upon those courts "a cognizance of cases not justly belonging "to them. It declares, if at any time in the "progress of the case either originally com-"menced in a Circuit Court or removed there "from a State Court, it shall appear to said "Court that such suit does not really involve "a dispute or controversy properly within "the jurisdiction of said Court, or that the "parties to said suit have been improperly "or collusively made or joined, either as "plaintiffs or defendants, for the purpose of "creating a case cognizable or removable "under this act, the said Circuit Court shall "proceed no further, but shall dismiss the "suit or remand it to the Court from which it "was removed."

Touching the steps to be taken in such a case to give the plaintiff a standing in a Court of Equity, the Court says:

"He must make an earnest, not a simu-

> "lated effort with the managing body of the "corporation to induce a remedial action on "their part, and this must be made apparent "to the Court. If time permits or has per- "mitted, he must show, if he failed with the "directors, that he has made an honest effort "to obtain action by the stockholders as a "body in the matter of which he complains, "and he must show a case, if this is not done, "where it could not be done or it was not "reasonable to require it."

That was before the rule was adopted. Almost immediately after handing down the decision in the Hawes case, the Supreme Court formulated and published the ninety-fourth rule in equity.

In *City of Quincy v. Steel*, 120 U. S. p. 241 (30 L. Ed. 624), the plaintiff, who was a citizen of Alabama, brought his bill against the City of Quincy, a municipal corporation of the State of Illinois, and the Quincy Gas, Light & Coke Company, a corporation of that State. The Court said:

> "We are of opinion that the demurrer of "the City of Quincy should have been sus- "tained for the reason that Mr. Steel shows "no sufficient ground why he should have "been permitted as a stockholder of the Gas "Company to sustain this bill. In order to "do this the circumstances must be such as "to justify the Court in the interest of justice "to override two cardinal principles of fed- "eral jurisprudence—one of these is that the "litigants in the Federal Courts, where the "right to sustain such litigation depends "upon the citizenship of the parties, shall be "citizens of different States. In this case, "the real right of action and the real con- "test before the Court, if it had proceeded,

> "would have been between two corporations "organized under the laws of Illinois and "existing and doing business in the same "place, to wit: the Gas Company and the "City of Quincy."

Central Railroad Co. v. Mills, 113 U. S. 249, 49 Law Ed. 949, was a removal case, but, of course, the question of jurisdiction is the same. The Court said:

> "The controversy in this case is not be- "tween citizens of different States. In truth "as well as in fact the parties on one side of "the controversy are citizens of New Jersey "and those on the other side of the contro- "versy are a New Jersey Corporation and "other citizens of New Jersey as well as a "Pennsylvanian corporation and citizens of "Pennsylvania and of Maryland. The bill is "filed by stockholders in the New Jersey cor- "poration in behalf of themselves and other "stockholders similarly situated to set aside "a lease made by that corporation acting in "concert with the other defendants, of its "railroad and property, in excess of its cor- "porate powers, and in fraud of the right of "the plaintiffs. All the defendants united in "defending the acts complained of against "them. The New Jersey corporation is in "no sense a merely formal party to the suit "or a party in the same interest with the "plaintiffs, but is rightly and necessarily "made a defendant."

The decree of the Circuit Court remanding the case to the State Court was confirmed.

In *East Tennessee Rr. Co. v. Grayson*, 119 U. S. 240 (30 L. Ed. 382), also a removal case in which the decree of the Circuit Court remanding the case

was affirmed, the Court cited the foregoing case with approval.

In *De Neufville v. New York, &c.* (81st Fed. Rep., p. 10), a bill was filed in the Circuit Court, a demurrer was filed, the demurrer sustained, and, on appeal to the Circuit Court of Appeals, the decree was reversed. Several questions were involved, upon some of which the judgment had to be reversed, no matter what might be the view of the Court upon the question here discussed. Therefore the remarks on that subject were obiter. The Court, in a *per curiam* opinion, said:

> "But in whatever form or under whatever "name it is presented, it is the cause of ac- "tion of the corporation, and of the corpor- "ation alone. The real controversy is be- "tween the corporation, whose officers refuse "to assert its rights, and the alleged conspir- "ators, who have deprived it of its property. "If the wholesome rule approved by the Su- "preme Court in numerous decisions were "followed, and the parties arranged, not as "they stand in the title, but according to "their interest in the controversy, we would "have the New York & Northern Railway "Company classified as a plaintiff, and the "diversity of citizenship necessary to confer "jurisdiction would no longer exist. If the "Circuit Courts were entirely free to enforce "the provisions of the fifth section of the act "of 1875 to every case where it logically ap- "plies, they would no doubt be able to relieve "their dockets, as was suggested in Hawes v. "Oakland, 104 U. S. 450, of many cases "which have no proper place there; but the "decisions in Dodge v. Wolsey, 18 How. 331, "Hawes v. Oakland, supra, and Quincy v. "Steel, 120 U. S., 241, 7 Sup. Ct. 520, and the

> "ninety-fourth rule in equity seem to pre-
> "clude a strict application, in cases such as
> "the one at bar, of the rule that parties may
> "be rearranged according to interest in the
> "controversy."

If we understand this correctly, the learned Court expressed an opinion against the jurisdiction of the Court below, but proceeded to intimate an opinion that the cases cited preclude a strict application in that case of the rule that parties may be rearranged according to interest in the controversy. With the utmost deference to a Court of so much learning and authority, we beg to submit that the cases of Hawes v. Oakland and Quincy v. Steel have been misapplied, while as to the case of Dodge v. Wolsey, it may be said, with entire correctness, that the precise question here presented was not raised in that case, and that the case was decided long before the enactment of the statute of 1875, which makes it the duty of the Court to align parties in a controversy according to their interest in it, and to dismiss the suit if the Court finds that it has no jurisdiction over the parties as thus aligned. And, as to the 94th Rule in equity, so far from precluding a strict application of the policy of rearranging parties according to interest in the controversy, it favors such alignment. That rule did not enlarge jurisdiction and it could not. The Courts of the United States are tribunals of constitutional and statutory jurisdiction. This Court cannot confer or enlarge the jurisdiction of the Circuit Courts by promulgating a rule of pleading, and did not attempt to do so. They exercise only such as has been granted. They may establish rules of practice, and Rule 94, so far as it has any effect

upon procedure in the United States Courts, is a rule of limitation instead of enlargement. Compliance with that rule may, in some cases, assist the Court to determine the proper attitude of parties with relation to their interest in the controversy; and yet compliance with it is not conclusive, as the Court will determine the question of interest and alignment from all the facts in the case; and, as enforcement of that rule tends to diminish rather than to multiply the cases to be heard by the Courts of the United States, it is difficult to perceive how it could have been thought that the rule was any impediment to the application of that other rule that parties will be arranged according to their interest in the controversy. Even when compliance with the rule is sufficiently alleged in the bill, the Court may determine, from all the allegations of the bill, whether jurisdiction over the real controversy is supported by diverse citizenship. Allegation of compliance with the rule may be denied and disproved, and then jurisdiction fails. It has no application except to cases over which the Court can otherwise take jurisdiction. It will not for a moment bear the construction that it confers or widens jurisdiction. Alignment may take place after the evidence is in as well as on the face of the complaint.

The learned counsel for appellants contends that the Court, in making the rule, conceded the jurisdiction in such cases. The rule only expresses what is the practice in many Courts of equity, without any formulation of a rule of Court on the subject. The only change made was in requiring *oath* to be made that "the suit is not a collusive one to confer upon a Court in the United States jurisdiction of a

case of which it would not otherwise have cognizance." It could as well be contended that when that allegation appears the Court must hold the bill a good one without regard to the equity of the bill, and without regard to diverse citizenship. This Court does not adjudge cases in advance on mere formal compliance with a rule of practice. It adjudges causes which come before it in due course of litigation. The simple truth is that the rule has, to a large extent, failed to accomplish the object intended. Verifying pleadings by oath has come to be almost a matter of mere form. It is a very rare occurrence that a litigant's conscience hesitates to make oath to any fact which the pleader puts in a complaint. The remedy now contended for, by applying to cases embraced within the rule, the presumption of co-citizenship of the corporation and its members, would be just, reasonable and effective. The rule has sometimes been called by the bar "jurisdictional." It will not bear that construction, because that would imply that this Court had exceeded its power. It is jurisdictional only so far that a Circuit Court may well dismiss a bill for non-compliance with the rule as a rule of practice. These remarks are called for by the contention of appellant's counsel. We do not contend that the bill does not allege compliance with the rule in this case.

In *Davenport v. Dows*, 18 Wall. 626, Dows, a citizen of New York, on behalf of himself and all other non-resident citizens of Iowa, who were stockholders in the Chicago, Rock Island Pacific Railroad Company, filed a bill against the City of Davenport, to stay the collection of a tax alleged to be illegal. The corporation was not made a party

defendant, and a demurrer was interposed, which was overruled. On appeal to this Court the decree was reversed, Mr. Justice Davis saying:

> "That a stockholder may bring a suit when "a corporation refuses is settled in Dodge v. "Woolsey (18 How., 340), *but such a suit "can only be maintained on the ground that "the rights of the corporation are involved.* "These rights the individual shareholder is "allowed to assert in behalf of himself and "associates, because the directors of the cor- "poration decline to take the proper steps to "assert them. Manifestly the proceedings "for this purpose should be so conducted that "any decree which shall be made on the "merits shall conclude the corporation. This "can only be done by making the corporation "a party defendant. *The relief asked is on "behalf of the corporation, not the individual "shareholder, and if it be granted the com- "plainant derives only an incidental benefit "from it. It would be wrong, in case the "shareholder were successful, to allow the "corporation to renew the litigation in an- "other suit, involving precisely the same sub- "ject matter.* To avoid such a result, a court "of equity will not take cognizance of a bill "brought to settle a question in which the "corporation is the essential party in inter- "est, unless it is made a party to the litiga- "tion."

A case directly in point, on the proposition involved in the present appeal, is *Arapahoe County v. Kansas Pacific Railway Co.*, 4 Dillon, 277; s. c., 1 Fed. Cas., 1080, decided by Mr. Justice Miller, who was then a member of this Court. The action was brought by the plaintiff, a citizen of Colorado, who filed a stockholder's bill in the State Court of Colo-

rado, making the Denver Pacific Railway Company, of which it was a stockholder and which was incorporated under the laws of Colorado, and also its directors, as well as the Kansas Pacific Railway Company, a citizen of Kansas, defendants. The Kansas Pacific Railway Company and the individual defendants, applied to remove the suit to the Circuit Court of the United States, under the act of March 3, 1875, and it was held that the suit was removable, on the ground that the Denver Pacific Railway Company, *although a defendant, was to be treated as a complainant.*

There are three cases upon which complainants may seek to rely in this connection. These cases are as follows, viz.:

Dodge v. Woolsey, 18 How., U. S., 331;
Cotting v. Kansas City Stock Yard Co. and the State of Kansas, 183 U. S., 79; and
Pollock v. Farmers' Loan & Trust Co., 157 U. S., 429.

None of these cases, however, will be found on inspection to militate against the appellees' contention.

In the Dodge case, the Court undoubtedly assumed jurisdiction of a case in which a corporation was sued by one of its stockholders, but the proposition here advanced by the defendants was not presented or considered in any way. Moreover, the question involved in that case was whether a tax, which had been imposed, was in violation of the United States Constitution, and as the existence of a Federal question will confer jurisdiction irrespective of diversity of citizenship, the mere fact that the court actually assumed jurisdiction cannot be

regarded as any authority against appellees' contention herein.

In the case of *Cotting v. Kansas City Stock Yard Co. and the State of Kansas*, 183 U. S., 79, jurisdiction of a litigation between stockholders of a corporation and the corporation, and others, was assumed by the Federal Courts, but the question involved, as in the preceding case, was a constitutional question, being, to use an expression made use of in the opinion at p. 113, simply a challenge to the constitutionality of a statute.

The proposition which counsel here presents does not appear to have been presented to the Court in that case.

In *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S., 429, a constitutional question was likewise presented, the constitutionality of a certain tax being the issue in the case.

In all of the above cases, as said above, and as the headnotes thereto indicate, constitutional questions were involved, and the citizenship of the respective parties did not, and could not, determine the right of jurisdiction exercised by the Federal Courts. Moreover, the question as to the conclusive presumption that stockholders of a corporation must be deemed residents of the State where the corporation was incorporated was not presented in any way. It is urged by appellants that such presumption is a mere legal fiction, but it has been held, in the cases cited in Point II. herein, to be a presumption of law, irrebuttable and indisputable.

And it would indeed be a singular species of legal legerdermain which would, in the same suit, uphold this legal fiction as to the residence of the complain-

ants when considering the situs or so-called citizenship of the corporation, and then immediately declare the fiction had ceased to exist when the Court came to inquire of what State the complainants were citizens.

Such a course would result in the nullification of what the courts declare to be an indisputable legal presumption, and would be illogical and would give the presumption only half its rightful force.

The question certified should be answered in the negative and the decree of the Circuit Court dismissing the bill affirmed.

GEO. H. YEAMAN,

of Counsel for Appellees.

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JAMES H. McKENNE

United States Supreme Court

OCTOBER TERM, 1904.

BERTHA DOCTOR AND KATHERINE SAYLES,

Appellants,

against

JOHN J. HARRINGTON, DENNIS A. HARRINGTON, SOL SAYLES COMPANY AND SAYLES, ZAHN COMPANY,

Appellees.

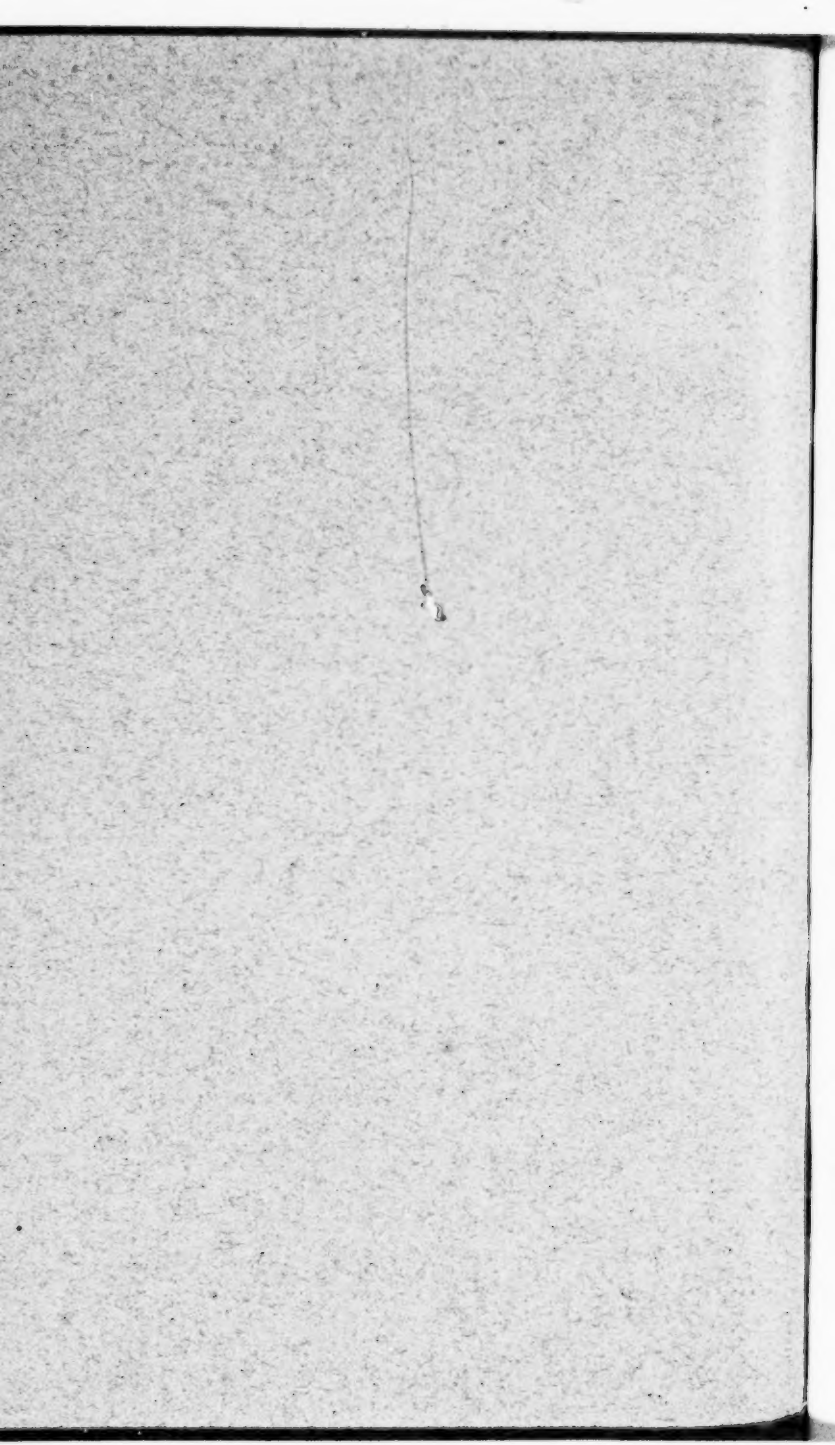
No. 477.

APPELLEES' ARGUMENT.

PHILIP J. BRITT,
Solicitor for Appellee

JOHN J. ADAMS,
Of Counsel.

New York.
Stillman Appellate Printing Co.
1905.



United States Supreme Court,

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Appellants,

against

JOHN J. HARRINGTON, DENNIS A. HARRINGTON, SOL SAYLES COMPANY and SAYLES, ZAHN COMPANY,
Appellees.

No. 477

Appeal from the Circuit Court of the United States for the Southern District of New York, Second Circuit.

APPELLEES' ARGUMENT.

The nature of this litigation is stated with substantial accuracy in the appellants' brief. It is conceded that the suit is brought by the complainants, not in their own right, but for the benefit of the defendant Sol Sayles Company, and that they are seeking to maintain this action in the right of that

company. The suit is, therefore, of the nature commonly known as "a derivative action."

The United States Circuit Court for the Southern District of New York dismissed the bill of complaint, for lack of jurisdiction, upon the two grounds which are stated on page 6 of the appellants' brief.

These propositions will now be considered.

ARGUMENT.

I.

This suit cannot be maintained in the Federal Courts, because there is no such diversity of citizenship between the complainants and defendants as is required under the Federal Statutes, since the complainants sue, not in their own right, but as stockholders of the Sol Sayles Company, and are, therefore, to be conclusively presumed, for all the purposes of jurisdiction, to be citizens of the State of New York, under the laws of which State the Sol Sayles Company was organized, and of which State all the other defendants are citizens.

We are brought *in limine* to a consideration of the question, as to what is the nature of this action.

Is it one brought in the right of the complainants, or in the right of the Sol Sayles Company, of which the complainants are stockholders? The bill of complaint indicates, in every line, that the complainants, as such, have absolutely no standing in Court, and that they cannot prevail unless the Sol Sayles Company could as complainant, maintain this action. Had it instituted the suit, the complainants could have no pretence of a cause of action.

Although this proposition stands admitted, as it must be, by the appellants, it will serve to strengthen the appellees' position, by calling attention to the expressions of this and other Courts, in a number of similar cases, which define the nature of such an action.

(a) The action is brought in the right of the corporation.

In *Davenport v. Dows, 18 Wall., 626,* Dows, a citizen of New York, on behalf of himself and all other non-resident citizens of Iowa, who were stockholders in the Chicago, Rock Island and Pacific Railroad Company, filed a bill against the City of Davenport, to stay the collection of a tax alleged to be illegal. The corporation was not made a party defendant, and a demurrer was interposed, which was overruled. On appeal to the United States Supreme Court the decree was reversed, Mr. Justice DAVIS saying:

"That a stockholder may bring a suit when a corporation refuses is settled in Dodge v. Woolsey (18 How., 340), *but such a suit can only be maintained on the ground that the rights of the corporation are involved.* These rights the individual shareholder

is allowed to assert in behalf of himself and associates, because the directors of the corporation decline to take the proper steps to assert them. Manifestly the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. *The relief asked is on behalf of the corporation, not the individual shareholder, and if it be granted the complainant derives only an incidental benefit from it. It would be wrong, in case the shareholder were unsuccessful, to allow the corporation to renew the litigation in another suit, involving precisely the same subject matter.* To avoid such a result, a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, and as it is made a party to the litigation."

In *Dewing v. Perdicaries, 96 U. S., 197*, Mr. Justice SWAYNE said:

"There are cases in which a corporation, having refused to do its duty, by suing to avert a threatened wrong, a stockholder was permitted to intervene in its stead, making the corporation party. Dodge v. Woolsey, 18 How., 331, is one of this kind. The cases are more numerous where the directors have made themselves personally liable for neglect or breach of duty and the corporation refusing to proceed against them, a stockholder has been permitted to sue in its behalf. *In such cases the corporation is an indispensable party. The refusal must be made definitely to appear; and the avails of the litigation, if there be any, go to the corporation, and are a part of its means as if it had itself sued and recovered.*"

In *Porter v. Sabin, 149 U. S., 473*, the plaintiffs, who were citizens of Illinois and stockholders in the Northwestern Manufacturing and Car Com-

pany, a corporation of Minnesota, brought an action against certain officers of the company, for fraudulent misappropriation of its property, without making the corporation or its receiver a party to the suit. It was held that the action could not be maintained, Mr. Justice GRAY, in explanation of the cause of action, using the following pertinent expression:

"The right to maintain a suit against the officers of a corporation for fraudulent misappropriation of its property is a right of the corporation; and it is only when the corporation will not bring the suit, that it can be bought by one or more stockholders in behalf of all. Hawes v. Oakland, 104 U. S., 450. The suit, when brought by stockholders, is still a suit to enforce a right of the corporation, and to recover a sum of money due to the corporation; and the corporation is a necessary party, in order that it may be bound by the judgment. Davenport v. Dows, 18 Wall., 626."

In *Dickerman v. Northern Trust Company, 176 U. S., 188*, an action in which certain stockholders sought to intervene for the purpose of defending a foreclosure suit in the right of the corporation, Mr. Justice BROWN said:

"It should be borne in mind in connection with the several defences set up by the intervenors that they do not appear here in the capacity of creditors, but as stockholders; *that their rights are the rights of the corporation and must be asserted and enforced through the corporation, and upon the theory that the latter has or threatens, by collusion or otherwise, to neglect the proper defense of the foreclosure suit.* Dodge v. Woolsey, 18 How., 331, 341, 343; Koehler v. Black River Falls Iron Co., 2 Black, 715; Bronson v. LaCrosse &c. Railroad, 2 Wall., 283; Davenport v. Dows., 18 Wall., 626;

Dewing v. Perdicaries, 96 U. S. 193; Hawes v. Oakland, 104 U. S., 450, 460; Greenwood v. Freight Co., 105 U. S., 13; Detroit v. Dean, 106 U. S., 537; Cook on Stockholders, §§645, 659, 750."

The same rules have been fully recognized by the Court of Appeals in New York, in a number of carefully considered cases.

In *Alexander v. Donohoe, 143 N. Y., 203*, that action was by a stockholder to set aside certain transactions and conveyances relating to property belonging to a corporation on the ground that same were fraudulent.

EARL, J., writing for the New York Court of Appeals, said at p. 211:

"Suing as a stockholder the plaintiff's right of action is a derivative one. He sues, not primarily in his own rights, but in right of the corporation. The wrongs of which he complains are wrongs to the corporation. They were not aimed at him and did not involve his personal, individual rights. He suffers as a member of the corporation, and it is the party to sue for and recover damages for the wrongs, or equitable relief against the frauds alleged. The complaint is that all the alleged frauds running through twelve years in the end culminated in final wrong and injury to the corporation, and for relief on account of such wrong and injury a stockholder could only sue in case the corporation upon his demand, or what is equivalent thereto, refused or neglected to sue (Hawes v. Oakland, 104 U. S., 450). And in such an action any defense which a defendant would have if the corporation itself were the actual plaintiff, may be interposed to bar the stockholder."

In *Flynn v. Brooklyn City R. R. Co., 158 N. Y., p. 493*, the plaintiff sued as a stockholder of a street railroad corporation to setaside a lease made by the

corporation and to compel a transfer of the property covered by the lease, and it was decided that the action was representative in character.

VANN, J., said in writing the opinion of the Court at pp. 507, 508:

"Where a majority of the directors, or stockholders, or both, acting in bad faith, carry into effect a scheme which, even if lawful upon its face, is intended to circumvent the minority stockholders and defraud them out of their legal rights, the courts interfere and remedy the wrong. Action on the part of directors or stockholders, pursuant to a fraudulent scheme designed to injure the other stockholders, will sustain an action by the corporation, or, if it refuses to act, by a stockholder, in its stead for the benefit of all the injured stockholders (Leslie v. Lorillard, 110 N. Y., 519-535; Gamble v. Queens County Water Co., 123 N. Y., 91; Sage v. Culver, 147 N. Y., 245; Farmers' Loan & Trust Co. v. N. Y. & N. Ry. Co., 150 N. Y., 410; Hawes v. Oakland, 104 U. S., 450). When a contract founded in fraud is executed by the directors with a third party upon the express approval of a required number of stockholders, with the intention on the part of all concerned to defraud the non-assenting stockholders, and the scheme will naturally result in serious injury to them or to the corporation, a court of equity will set aside the fraudulent transaction and compel the delinquent parties to account. Such is the case before us as we interpret the complaint.

The right of action, however, belongs to the corporation, and should be brought by it as plaintiff, but when it will not bring the suit itself, an aggrieved stockholder, after due demand and a refusal, or unreasonable neglect to proceed, may bring it in his own name upon making the corporation a party defendant (Greaves v. Gauge, 69 N. Y., 154).

It might be well to note here that there are two classes of stockholders actions. In the one class we find those actions in which injury has been done to the stockholder directly, and he sues in his own right for the damages sustained by him; in the other class of cases the injury is done to the corporation, and the stockholder, if he can sue at all, must sue, not in his own behalf, but in behalf of the corporation. The distinction between the two classes of cases is clearly pointed out in *Niles v. N. Y. C. & H. R. R. Co., 176 N. Y., 119.* In that case plaintiff sued for damages resulting from conspiracy to wreck a corporation, and the court sustained a demurrer to the complaint, holding that such an action must be brought by the corporation and not by an individual stockholder.

The Court, per HAIGHT, J., said at pp. 123-124:

"The refusing of traffic and the diversion of funds operated to deplete the company's treasury and was a direct wrong to the corporation. It was an injury for which an action could have been maintained by the corporation, its receiver, if one had been appointed, or by any stockholder, after proper demand, in behalf of the company and for its benefit. In such an action the creditors are vitally interested. They have the right to have the action prosecuted on behalf of the company, so that their interest may be protected and their claims paid out of any recovery which may be obtained.

"True, the plaintiff has suffered a depreciation in the value of his stock as a result of the wrong, and in this respect the injury was personal to the holders of the stock. But every stockholder has suffered from the same wrong, and if the plaintiff can maintain an action for the recovery of the damages sustained by him, every stockholder must be accorded the same right. The injury, however, resulting from the wrong was, as we have seen,

to the corporation. The depreciation in the value of the plaintiff's stock, and that of the other stockholders, was in consequence of the waste and destruction of the property and franchise of the corporation. There are wrongs which if committed against a stockholder entitle him to a right of action against the person committing the wrong for the damages sustained, as, for instance, where a person had been induced to purchase stock in a corporation and pay a higher price than the stock was fairly and reasonably worth, or where the owner of stock had been induced to part with it for a less sum than its true value, by reason of false and fraudulent representations of others with reference to its value (Rothmiller v. Stein, 143 N. Y., 581; Ritchie v. McMullen, 79 Fed. Rep., 522). But these wrongs are distinguishable from those against the corporation. They result in injury to the stockholder upon whom the wrong is practiced, but do not injure the other stockholders of the corporation itself The injuries, however, in this case are not of that character."

And the learned Justice summed up the whole situation in this language, at p. 126:

"We think that the damages belong to the corporation and not to the individual stockholder, and that the judgment should be affirmed with costs."

The rule has been fully recognized in many other cases, including

Smith v. Hurd, 12 Mete., 371.
Allen v. Curtis, 26 Conn., 456.

These authorities establish three propositions: (1) that the complainants in such an action, sue in the right of the corporation; (2) that such action can only be brought by the stockholders where the corporation refuses to sue, and (3)

that where the stockholders sue, the corporation is a necessary party defendant in order that it may be bound by the decree, and that whatever may be recovered shall be administered by it.

(b) *The theory on which the corporation is suable in the Federal Courts.*

The corporation being thus a necessary party, the question arises as to the theory on which the corporation can be brought into a Federal Court. This brings up the long mooted question, as to whether or not a corporation is a citizen within the meanng of the Judiciary Act and its amendments.

Immediately after the passage of the Judiciary Act of September 24, 1789, Chapter 20, Section 11, which conferred jurisdiction on the Circuit Courts of suits of a civil nature in common law and equity "between a citizen of the State where the suit is brought and a citizen of another State," corporations were allowed to sue and be sued in the Circuit Courts only when all the members of the corporation were, and were alleged to be citizens of the state which created the corporation.

Bank of U. S. vs. Dereaux, 5 *Cranch*, 61.
Hope Ins. Co. vs. Boardman, 5 *Cranch*, 57.
Sullivan vs. Fulton Steamboat Co., 6 *Wheat* 540.
Breithaupt vs. Bank of Georgia, 1 *Pet.*, 238.
Commercial Bank vs. Slocomb, 14 *Pet.*, 60.

In 1844, in the case of *Louisville, &c., R. R. Co. vs. Letson (2 How. U. S., 497, 558)*, it was held that it was sufficient to sustain jurisdiction that the corporation was created by a different state from that

of which the opposite party was a citizen, Mr. Justice WAYNE stating that the Court rested its judgment on the ground "that a corporation created by and doing business in a particular state is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person," and that for these purposes the members of a corporate body must be conclusively presumed to be citizens of the State in which the corporation is domiciled.

This decision was followed in

Marshall vs. Baltimore & Ohio R. R. Co., 16 Ohio, 314, 328.

Covington Drawbridge Co. vs. Shepherd, 20 How., 227, 233.

Ohio & Mississippi R. R. vs. Wheeler, 1 Black, 286, 296.

Muller vs. Dows, 94 U. S., 444.

Steamship Co. vs. Tugman, 106 U. S., 118, 121.

Memphis & Charleston R. R. vs. Alabama, 107 U. S., 581.

Shaw vs. Quincy Mining Co., 145 U. S., 444, 451.

In *St. Louis & San Francisco Railway Co. vs. James* (*161 U. S., 545*) the same doctrine was applied in a case in which the various authorities were carefully reviewed, among others the cases above cited, and as a result of his investigation into the decisions Mr. Justice SHIRAS made the following deductions (p. 562):

"To fully reconcile all the expressions used in these cases would be no easy task, but we think the following propositions may be fairly deduced from them: There is an indisputable legal presumption that a state corporation, when sued or suing in a Circuit Court of the United States, is composed of citizens of the State which created it, and hence such a corporation is itself deemed to come within that provision of the Constitution of the United States which confers jurisdiction upon the Federal Courts in 'controversies between citizens of different states.' * * * The presumption that a corporation is composed of citizens of the State which created it accompanies such corporation when it does business in another State, and it may sue or be sued in the Federal Courts in such other State as a citizen of the State of its original creation.

"We are now asked to extend the doctrine of indisputable citizenship, so that if a corporation of one State, indisputably taken, for the purpose of Federal jurisdiction, to be composed of citizens of such State, is authorized by the law of another State to do business therein, and to be endowed, for local purposes, with all the powers and privileges of a domestic corporation, such adopted corporation shall be deemed to be composed of citizens of the second State, in such a sense as to confer jurisdiction on the Federal Courts at the suit of a citizen of the State of its original creation.

"We are unwilling to sanction such an extension of a doctrine which, as heretofore established, went to the very verge of judicial power. That doctrine began, as we have seen, in the assumption that State corporations were composed of citizens of the State which created them; but such assumption was one of fact, and was the subject of allegation and traverse, and thus the jurisdiction of the Federal Courts might be defeated. *Then, after a long contest in this court, it was settled that the presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary.* There we are content to leave it."

In *Barrow Steamship Co. vs. Kane (170 U. S., 100)* Mr. Justice GRAY, after citing the early cases on the subject of jurisdiction over corporations, said:

"But the earlier cases were afterwards overruled; and it has become the settled law of this court that, for the purposes of suing and being sued in the courts of the United States, a corporation created by and doing business in a State is, although an artificial person, to be considered as a citizen of the State as much as a natural person; *and there is a conclusive presumption of law that the persons composing the corporation are citizens of the same State with the corporation.*"

In *Southern Railway Co. vs. Allison (190 U. S., 326)* it was held that, although a statute of North Carolina provided that a foreign railroad company desiring to own property or carry on business, or exercise any corporate franchise within the State, must comply with certain specified provisions of the statute, and on complying therewith shall become a domestic corporation, such fact does not affect the character of the original corporation, and it does not thereby become a citizen of North Carolina so far as to affect the jurisdiction of the Federal Courts upon a question of diverse citizenship. In the course of his opinion, Mr. Justice PECKHAM said:

"It early became material to inquire into the nature of the status of corporations with regard to the jurisdiction of Federal Courts under the Constitution and laws of the United States. A recent statement of the law on that subject is contained in the case of St. Louis and San Francisco Railway Co. v. James (161 U. S., 545). It was said by

Mr. Justice SHIRAS in delivering the opinion of the Court in that case, that after considerable contention in the Courts it was finally determined by this Court that the citizenship of a corporation was that of the State originally creating it, and that it was a presumption of law that the members of the corporation were citizens of the same State."

See, also,

Great Southern Fire Proof Hotel Co. vs. Jones, 177 U. S., 456.

Taylor vs. Illinois Central Ry. Co., 89 Fed. Rep., 119.

These authorities have been approved in the recent case of *Thomas v. Board of Trustees, 195 U. S., 207,* where Mr. Justice HARLAN, after a full review of the decisions above cited, and speaking for a unanimous Court, says:

"That the jurisdiction of a Circuit Court of the United States is limited in the sense that it has no jurisdiction except that conferred by the Constitution and laws of the United States; that a cause is presumed to be without its jurisdiction unless the contrary affirmatively appears; that such jurisdiction, or the facts upon which in legal intendment it rests, must be distinctly and positively averred in the pleadings or should appear affirmatively and with equal distinctness in other parts of the record, it not being sufficient that jurisdiction may be inferred argumentatively; *and that, for the purpose of suing and being sued in a Circuit Court of the United States, the members of a local 'corporation' are conclusively presumed to be citizens of the State by whose laws it was created,* and in which alone the corporate body has a legal existence; are propositions so firmly established that further discussion of them would be both useless and inappropriate."

We have thus repeated declarations by this Court that jurisdiction in the Federal Courts over a corporation depends upon its status, which in turn is dependent upon the State of its original incorporation, and upon the conclusive, irrebuttable presumption of law that all of the members of the corporation, that is, all of its stockholders, are citizens of the State in which the corporation was organized.

Here, therefore, the Sol Sayles Company is to be treated as a citizen of New York, because it was there incorporated and because it is presumed as matter of law, irrespective of what the actual facts may be, that all of its stockholders are citizens of the State of New York.

(c) The Corollary of the proposition that the stockholders of the defendant corporation are citizens of New York.

It would involve a manifest absurdity to say, in the light of this presumption, that the complainants, who are stockholders and members of the Sol Sayles Company, are not citizens of the State of New York, when it is solemnly declared, that for the purpose of giving jurisdiction over the corporation, they are such citizens.

It is a physical impossibility that the complainants should be citizens of New Jersey and of New York at the same time, for the purpose of jurisdiction. If they are presumed as matter of law to be citizens of New York, in order to constitute the Sol Sayles Company, a citizen of that State, and such presumption overcomes the actual facts, then it seems impossible, that in the same breath they should be permitted to say that they

are citizens of New Jersey. And if they are citizens of New Jersey, then it would seem to be absurd to say that the corporation, jurisdiction of which depends upon the citizenship of its members, is a citizen of the State of New York, or of any State other than that of which its stockholders are citizens.

It may be urged that the presumption of the citizenship of the members of the corporation, which has been laid down in so many of the cases, is a legal fiction. But even though this be so, it seems impossible, that a legal fiction shall not be carried to its logical conclusion in the very proceeding in which such fiction is indulged. Would it not be the height of the ridiculous, to say, that, although by a legal fiction the defendant corporation is to be deemed a citizen of New York, because all of its stockholders are as a matter of law presumed to be citizens of that State, in the same breath to declare that, for the purpose of suing that corporation, of which they are members, they are citizens of another State? That would be blowing hot and cold with a vengeance, and would nullify what the authorities declare to be, a conclusive, indisputable, and irrefutable presumption, at the very instant when the presumption is indulged.

In effect the complainants come into court and say:

"We are stockholders of a corporation, every member of which is a citizen of New York, and, therefore, this court must consider the corporation a citizen of that State; but although as such stockholders we are citizens of New York, nevertheless, because we are in fact citizens of New Jersey, we ask the Federal Court to assume jurisdiction on the ground of a diversity of citizenship."

It would indeed be a singular species of legal legerdermain which would, in the same suit, uphold this legal fiction as to the citizenship of the defendants when considering the situs or so-called citizenship of the corporation, and then immediately declare that the fiction had ceased to exist when the Court came to inquire of what State the complainants were citizens.

Such a course would result in the nullification of what the courts declare to be an indisputable legal presumption, would be illogical and involve a judicial absurdity.

(*d*) *The Authorities cited for Appellants.*

The appellants, while recognizing the logic of this proposition, insist that the appellees are precluded from making the point now raised, by the decisions in

Dodge v. Woolsey, *18 How., 331.*
Hawes v. Oakland, *104 U. S., 450.*
Quincy v. Steel, *120 U. S., 241.*
Pollock v. Farmers' L. & T. Co., *157 U. S., 429.*
Cotting v. Kansas City Stock Yard Co., *183 U. S., 79.*

It is respectfully submitted that none of these cases will be found, on inspection, to militate, to the slightest extent, against the appellees' contention.

1. In *Dodge v. Woolsey* (*supra*) the Court undoubtedly assumed jurisdiction of a case, in which a corporation was sued by one of its stockholders, but the proposition here advanced by the defend-

ants was not presented or considered in any way. Moreover, the question involved in that case was, whether a tax, which had been imposed, was in violation of the United States Constitution, and as the existence of a Federal question will confer jurisdiction, irrespective of diversity of citizenship, the mere fact that the Court actually assumed jurisdiction, cannot be regarded as an authority against defendants' contention herein.

Moreover, that case was distinguished and limited in *Hawes v. Oakland* (*supra*).

It is further to be observed, that *Dodge v. Woolsey* arose prior to the Act of 1875, relating to the jurisdiction of the United States Circuit Court, and to the promulgation of the doctrine as to the alignment of parties, first suggested in the *Removal Cases*, *100 U. S.*, *457*, which will be more fully considered under the next point.

2. In *Cotting v. Kansas City Stock Yard Co.* (*supra*) jurisdiction of a litigation between stockholders of a corporation and the corporation, and others, was assumed by the Federal Courts, but the question involved, as in the preceding case, was a constitutional question, being, to use an expression made use of in the opinion at page 113, "simply a challenge to the constitutionality of a statute."

The proposition which counsel here presents does not appear to have been presented to the Court in that case and for the reason already stated, will have been futile.

3. In *Pollock v. Farmers' Loan and Trust Co.* (*supra*), a constitutional question was likewise presented, the constitutionality of the Income

Tax being the issue in the case, based entirely on a violation of the Federal Constitution and hence jurisdiction existed, independently of the citizenship of the parties.

In all of the above cases, constitutional questions were alone involved, and the citizenship of the respective parties did not, and could not, determine the right of jurisdiction exercised by the Federal Courts. Moreover, the question as to the conclusive presumption, that stockholders of a corporation must be deemed citizens of the State where the corporation was incorporated, was not presented in any way.

4. *Hawes v. Oakland (supra)*, which is also cited by the appellants, is not an authority on this proposition, because the question here involved was not considered or discussed; nor was jurisdiction entertained, the bill of complaint having been dismissed by the Circuit Court, and such dismissal having been approved by this Court.

Furthermore, that case pointed out, in most emphatic language, the abuses which had sprung up under the decision in Dodge v. Woolsey; and that those abuses have continued down to the present day, has nowhere been more emphatically expressed than in the opinion of the United States Circuit Court of Appeals, for the Second Circuit, in *De Neufville v. New York & Northern Railway Co., 81 Fed. Rep., 10, 13*, which is cited on the appellants' brief.

5. The case of *Quincy v. Steel (supra)* is likewise a case in which the Court refused to entertain jurisdiction, and hence cannot be authority for the appellants. The following significant language is

to be found in the opinion of Mr. Justice MILLER in that case:

"We are of opinion that the demurrer of the City of Quincy should have been sustained, for the reason that Mr. Steel shows no sufficient ground why he should have been permitted as a stockholder of the gas company to sustain this bill. In order to do this the circumstances must be such as to justify the Court, in the interest of justice, to override two cardinal principles of Federal jurisprudence. One of these is, that the litigants in the Federal Courts, where the right to sustain such litigation depends upon the citizenship of the parties, shall be citizens of different States. In this case the real right of action and the real contest before the Court, if it had proceeded, would have been between the two corporations, organized under the laws of Illinois, and existing and doing business in the same place, to wit, the gas company and the City of Quincy."

6. The appellants have also cited *Utah-Nevada Company v. De Lamar, 133 Fed. Rep., 113*, but it will be found that there, the case was remanded to the State Court, for lack of jurisdiction, and, although the question here involved was discussed, whatever the Court said upon that subject was clearly *obiter;* as was also the case in *Hanchett v. Blair, 100 Fed. Rep., 817*, which is cited as authority.

In both of those actions, the plaintiffs, although stockholders of the defendant corporations, were not suing in the right of the corporation to which they severally belonged.

In *Hanchett v. Blair*, the plaintiff sought to foreclose a mortgage which was given to him by the corporation. The decree rendered in the action

was one which was not in favor of the corporation, but against it. The recovery was in his favor, and for his sole benefit, and not in favor of, or for the benefit, or in the interest of the corporation.

In the *De Lamar Case* the plaintiff sued to recover a large sum of money owing by the corporation to the plaintiff's assignor under an agreement for the purchase of mining property. There, the recovery was likewise for the benefit of the plaintiff, and he was suing solely in his own right, and in no possible, or conceivable, sense for the benefit of the corporation, and that fact is emphasized in the opinion.

7. Finally, the appellants rest their argument upon the *94th Rule in Equity*, and argue that if the appellees' present contention were correct, that rule would not have been promulgated.

(*a*) That is not, however, a correct interpretation of the rule. It applies to all cases brought in the Federal Courts against a corporation; even to a case where a Federal question is involved, as, for example, such questions as came up in *Dodge v. Woolsey*, *Pollock v. Farmers' Loan & Trust Co.*, and *Cotting v. Kansas City Stock Yard Co.*

Even in such a case compliance with the rule must be shown. That is clearly indicated by a recent decision of this Court in *Davis & Farnum Mfg. Co. v. Los Angeles*, *189 U. S.*, *220*.

(*b*) Moreover, this rule would receive full effect in certain cases where there is a diversity of citizenship, where there has been an alignment of parties under the rule, which will be considered under the next Point. Thus, for instance, if suit were brought against the directors of a corpora-

tion, and other parties dealing with the corporation in fraud of the rights of stockholders, in the United States Circuit Court, in a district in which such defendants other than the corporation are defendants. In such a case, by arranging the parties according to their interests, there might be a diversity of citizenship, such as would confer jurisdiction upon the Federal Courts. In such a case it would be important, under Rule 94, to show that the suit is not a collusive one, as, for instance, that the complaining stockholders did not become such for the purpose of enabling them to bring a suit in the Federal Courts. Thus, for example, if this suit had been brought in Pennsylvania, and the Harringtons and Sayles, Zahn Company had been citizens of that State, and the complainants citizens of New Jersey, and the Sol Sayles Company a citizen of either New York or New Jersey, in such a case the Federal Courts, by aligning the Sol Sayles Company with the complainants, would doubtless take cognizance of the action, unless the fact were not negatived that the complainants had become stockholders for the collusive purpose of bringing this action.

(*c*) Furthermore, Rule 94 did not and could not enlarge the jurisdiction of the Federal Courts. The Courts of the United States have no jurisdiction, except such as is conferred upon them by the Federal Constitution and by the acts of Congress. They cannot create jurisdiction for themselves, and can exercise only such as has been expressly granted to them. They may establish rules of practice, but Rule 94, so far as it has any bearing upon the procedure in the Federal

Courts, is a rule of limitation rather than one of enlargement. Compliance with it may in some cases assist the Court in determining the proper attitude of the parties, with relation to their interests in the controversy, yet compliance with it is not conclusive, for the Court will determine the question of jurisdiction, and also the real status of the parties, as distinguished from their apparent status.

(*d*) Again, the enforcement of Rule 94 has had a tendency to restrict rather than to multiply the cases which have come into the Federal Courts, and it is, therefore, difficult to perceive how that rule can be considered as impeding the application of the Acts of Congress, which defines the jurisdiction of the Federal Courts, as they have been construed and applied in the numerous cases which we have cited. In other words, Rule 94 has no application to any cases, except those over which the Court has statutory jurisdiction.

II.

This suit being a derivative one, in which the complainants are suing solely for the benefit of the Sol Sayles Company, a New York corporation, that corporation, although in form a defendant, is, in legal effect, on the same side of the controversy as the complainants, and, since it is a citizen of the same State as the remaining defendants, the Federal Courts have no jurisdiction, as the suit does not involve a controversy between citizens of different States.

The nature of this suit has been fully considered under Point I. The authorities which are there cited, demonstrate the proposition, that the complainants cannot maintain this suit except in the right of the Sol Sayles Company, and that their right to relief must be tested by the right of the Sol Sayles Company to obtain redress for the alleged wrongs, which are set forth in the bill of complaint.

Shortly after the passage of the act of March 13, 1875, relating to the jurisdiction of the United States Circuit Court, the question arose as to whether the Federal Court was bound, as it apparently was under the previous legislation, to take or deny jurisdiction by the position which the

parties occupied in the pleadings, either as plaintiffs or defendants.

One of the first cases in which that question was presented was *Arapahoe County v. Kansas Pacific Railway Co., 4 Dillon, 277; s. c., 1 Fed. Cas., 1080,* decided by Mr. Justice MILLER, who was then a member of this Court. The action was brought by the plaintiff, a citizen of Colorado, who filed a stockholder's bill in the State Court of Colorado, making the Denver Pacific Railway Company, of which it was a stockholder, and which was incorporated under the laws of Colorado, and also its directors, as well as the Kansas Pacific Railway Company, a citizen of Kansas, defendants. The Kansas Pacific Railway Company and the individual defendants, applied to remove the suit to the Circuit Court of the United States, under the act of March 3, 1875, and it was held that the suit was removable, on the ground that the Denver Pacific Railway Company, although a defendant, was to be treated as a complainant. The following extended extract from the opinion is submitted as conclusive in support of this contention:

"The case then rests upon the question of whether the fact that the Denver Pacific Railway Company is a party defendant, and is a citizen of the same State of the party plaintiff, ousts the jurisdiction of this court or defeats the right of removal of the other parties who are citizens of other States. That question does not rest upon the same principle as the case of Messrs. Sayre and Moffat. The Denver Pacific Railway Company is a necessary party to this suit; it is one without which the suit cannot proceed. The main object of this suit, aside from obtaining a temporary injunction, and the appointment of a receiver, is to obtain an accounting with the Kansas Pacific

Railway Company and other defendants, on an allegation that a majority of the trustees of the Denver Pacific Railway Company have been committing frauds, and thus depriving that company of the funds belonging to it. The relief sought is an accounting, and the relief asked is a decree in favor of the Denver Pacific Railway Company for the amount found due upon that accounting. The Denver Pacific Railway Company is a necessary party to that accounting. A party cannot be required to go to all the trouble of accounting and having a decree, when that accounting and decree will not be a valid defense against the principal party having the right to call such party to account. If the suit was merely between the county commissioners and these trustees, the decree would not protect the trustees, whether they were decreed to pay over moneys, or whether they were discharged or acquitted. It would be no protection against the Denver Pacific Railway Company in another suit upon the same cause of action. This shows very clearly that the Denver Pacific Railway Company is not a mere nominal party, but is an indispensable party. But, as already stated, the main relief sought in this case will be, if the suit is successful, a decree in favor of the Denver Pacific Railway Company for the amount found due from the other defendants in this case. That is an important and significant feature of the transaction. In an action at law a suit could not be maintained in which the Board of Commissioners of Araphoe County should be plaintiffs, and the Denver Pacific Railway Company and these petitioners defendants, in which a judgment should be asked for One hundred thousand dollars in favor of the Denver Pacific Railway Company against itself and its co-defendants. The Court would say, you cannot make two defendants litigate before a jury and get a verdict as between themselves, while the party who brought the suit looks on as having no interest in the transactions. But the flexibility of the mode of proceedings in a Court

of Chancery is such that, for the attainment of justice, you may, in some instances, where the party is not before the Court, make him a defendant, when he will not be a plaintiff. You cannot compel him to hazard the results of a defeat, though his presence in the court may be necessary for the rights of somebody else, and his rights be with the plaintiff in the case. In suits at common law he would be there as plaintiff, if there at all. By the rules and practice in equity the court allows him to be defendant in the case; but the mere fact that he is placed as defendant instead of plaintiff in a suit in chancery, never changes his relation to the controversy in the case, and it is very clear that the interest of the Denver Pacific Railway Company is the interests of the plaintiffs; that their interest is identical—that the Board of County Commissioners are using the name of the Denver Pacific Railway Company to carry on this suit solely for the benefit of that company. The Denver Pacific Company, being in the control of the defendants, refused to bring this suit, and the complainants, stockholders of that company, were of necessity compelled to make it defendant, that it might be brought before the court; but when before the court, the company is entitled to recover against the other defendants. The complainants recognize this themselves, for in their prayer for relief they say expressly what they pray for is a decree in favor of the Denver Pacific Railway Company against the Kansas Pacific Railway Company and the other defendants. Now, the controversy in this case is one in which the Commissioners of Araphoe County and the Denver Pacific Railway Company are on one side, citizens of the State of Colorado, against all the other defendants. And all the other defendants are citizens of other States, except Sayre and Moffat, and the controversy, in the language of the constitution and of the statutes, is one between citizens of the State of Colorado and citizens of other States, and therefore within the meaning of the Constitution of the United

States, and within the meaning of the statute under which this removal is sought. The statute says, in the second section, 'that any suit of a civil nature, at law or equity, now pending or hereafter brought in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of Five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State, claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens or subjects either party may remove said suit into the Circuit Court of the United States for the proper district; and when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different States, and which can fully be determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit to the Circuit Court of the United States for the proper district.'

"The best judgment that I am able to give is that this is a controversy between citizens of the State of Colorado on one side, and citizens of other States on the other side, and is properly subject to removal."

Citing this decision in *Walden v. Skinner, 101 U. S., 589*, Mr. Justice CLIFFORD referred to it as "decisive authority."

This doctrine was speedily adopted by this Court, and has been since applied in innumerable cases, a long line of which is cited on page 292 of Vol. 4 of Federal Statutes Annotated, title "Judiciary."

Special attention should be given to

The Removal Cases, 100 U. S., 457.
Pacific Railroad v. Ketchum, 101 U. S., 289.
Harter v. Kernochan, 103 U. S., 562.
Evers v. Watson, 156 U. S., 532.
Brown v. Truesdale, 138 U. S., 389, 395.
Merchants Cotton Press Co. v. N. A. Insurance Co., 151 U. S., 385.
Wilson v. Oswego Agency, 151 U. S., 63.

In *Harter v. Kernochan* (*supra*) the plaintiff, a township in Illinois, and a taxpayer thereof, on behalf of himself and other resident taxpayers, filed their bill in a court of that State against certain State, county and township officers, and the unknown owners and holders of certain township bonds, to restrain the levy and collection of a tax to pay the principal of the bonds or any interest thereon. A, a citizen of another State, was the owner of all of them. It was held that he was entitled to remove the suit to the Circuit Court of the United States, although the township officers were parties defendant with him. Mr. Justice HARLAN, however, said:

"We do not doubt that the suit was one which the defendant was entitled, under the act of March 3, 1875, c. 137, to remove from the State court. Disregarding, as we may do, the particular position whether as complainants or defendants, assigned to the parties by the draughtsman of the bill, it is apparent that the sole matter in dispute is the liability of the township upon the bonds; that upon one side of that dispute are all of the State, county, and township officers and taxpayers, who are made parties, while upon the other is Kernochan, the

owner of the bonds whose validity is questioned by this suit. He alone, of all the parties, is, in legal sense, interested in the enforcement of liability upon the township. It is, therefore, a suit in which there is a single controversy, embracing the whole suit, between citizens of different states, one side of which is represented alone by Kernochan, a citizen of Massachusetts, and the other by citizens of Illinois."

In *Covert vs. Waldron (33 Fed. Rep., 311, 312)* it was said:

"Where a Federal question is not involved, nor the conflicting grants of different States are in question, the controversies of which the Circuit Courts of the United States are given original cognizance must be between citizens of different States, or between citizens of a State and foreign citizens or subjects. It is abundantly settled by authority that, in arranging the parties relatively to the controversy between them, the mere form of the pleading may be set aside, and the parties placed on different sides of the matter in dispute, according to the facts. When, upon such an arrangement, it appears that citizens of the same state appear on both sides of the controversy, the controversy is not within the jurisdiction of the Circuit Court. Removal Cases, 100 U. S., 457; Railroad v. Ketcham, 101 U. S., 289; Barney v. Latham, 103 U. S., 205; Carson v. Hyatt, 118 U. S., 279; Blake v. McKim, 103 U. S., 336."

The same rule is laid down in other cases.

Cilly vs. Patton, 62 Fed. Rep., 498, 500.
Board of Trustees vs. Blair, 70 Fed. Rep., 414, 417.
Consolidated Water Co. vs. Babcock, 76 Fed. Rep., 642.

In *Shipp vs. Williams, 62 Fed. Rep., 4,* a bene-

ficiary under a deed of trust filed a bill against the debtor and the trustee to foreclose the deed of trust, the trustee having refused to act. The trustee and the debtor were citizens of the same State. It was held that the United States Circuit Court had no jurisdiction since the trustee, although a defendant, was really on the same side of the case as the beneficiary. Mr. Justice LURTON said:

"In courts of the United States, where the jurisdiction depends upon citizenship, all the co-plaintiffs must be competent to sue; and, if there is more than one defendant, each must be liable to be sued in those courts. If a trustee is, by his citizenship, qualified to sue in a Federal Court, the citizenship of the beneficiary under the trust is wholly unimportant. If the trustee is disqualified by reason of citizenship in the same State as that of the necessary defendants, the suit cannot be entertained, even though the beneficiary might be qualified. The jurisdiction is to be determined, in all such instances, by the citizenship of the trustee. Coal Co. v. Blatchford, 11 Wall 172. Neither is the rule changed by the refusal of the trustee to act. His refusal may authorize the beneficiary to exhibit a bill against the debtor to obtain a decree of foreclosure. But, if the legal title to the property conveyed in the trust be in the trustee, then the court could not grant any relief until the trustee was made a party defendant. * * * The duty of arranging parties according to their interests applies as well in cases of original jurisdiction under the first section of the act of March 3, 1875, as it does under the removal section of the same act. Arranging the parties to this suit according to their interests operates to place Woodworth and Wheeler on the same side of the case occupied by the complainants. We then have a case where some of the complainants are citizens of the same State as the defendants. Jurisdiction is thereby defeated."

To the same effect are

Gardner vs. Brown, 21 Wall., 36.
Pittsburg, C. & St. L. Ry. Co. vs. B. & O. R. R. Co., 61 Fed. Rep., 705.
Boston Safe Deposit & Trust Co. vs. City of Racine, 97 Fed. Rep., 817.
Old Colony Trust Co. vs. Atlanta Railway Co., 100 Fed. Rep., 798.
1 Foster's Federal Practice, p. 64.

As against these authorities, the appellants cite *Dodge v. Woolsey,* and the other authorities which have been reviewed under Point I.

Dodge v. Woolsey arose before the doctrine of the alignment of parties was suggested, and at a time when the Judiciary article relating to jurisdiction was couched in language which differed materially from the present act.

In the other cases cited, the question of the arrangement of parties was not suggested or considered, and the Court either dismissed the suits on sufficient grounds or had the right to entertain jurisdiction, not on the theory of diversity of citizenship, but because a Federal question was involved in the litigation.

Rule 94 is also cited in this aspect of the case, but what has been said with regard to that rule, under Point I., applies with full force here.

In the *De Neufville Case,* cited on pages 10, 11 of appellants' brief, it is very clear that the United States Circuit Court of Appeals, for the Second Circuit, felt that sound public policy required the application of the principle of arrangement of the parties, which the Court described as a "wholesome rule," but apparently felt precluded

from enforcing it by an erroneous and hasty reading of Rule 94, and of the decisions in *Hawes v. Oakland*, *Dodge v. Woolsey* and *Quincy v. Steel*, which, as we believe, we have fully explained.

Judge Lacombe, who united in that decision, and who rendered the decree now under review, has apparently revised his conclusions, and has applied the rule dictated by logical consistency, and sound public policy.

From a practical standpoint, it is believed, that the application of the principles for which we are contending, will do much to relieve the Federal Courts from a class of litigation, which naturally belongs in the State Courts, and which is sought to be taken out of the jurisdiction where it justly belongs by artifice, and, generally, from motives which will not bear close investigation.

In closing this brief, we wish to impress the point upon the Court, that there is no Federal question presented in this suit. The action is brought to set aside a judgment recovered in the Supreme Court of the State of New York against the Sol Sayles Company, by the Harringtons, and to compel the latter to restore to the treasury of the Sol Sayles Company, the specific property, which was sold by the Sheriff, under the execution issued on the judgment recovered in the State Court.

III.

The lack of jurisdiction of the Court can be raised at any stage of the litigation, and even though the appellees had not raised the question, the Court could, of its own motion, have dismissed the cause for want of jurisdiction.

The following cases abundantly support the above proposition, and appear to be conclusive on the question.

Grace v. American Cen. Ins. Co., 109 U. S., 278, 284.
Mexican Cen. R. R. Co. v. Pinkney, 149 U. S., 194.
Thomas v. Board of Trustees, 195 U. S., 207.

In *Grace v. American Cen. Ins. Co. (supra)*, at p. 283, it was said:

"The record in this case presents a question of jurisdiction which, although not raised by either party in the Court below, we do not feel at liberty to pass without notice. * * * As the jurisdiction of the Circuit Court is limited, in the sense that it had no other jurisdiction than that conferred by the Constitution and laws of the United States, the presumption is that a cause is without its jurisdiction, unless the contrary affirmatively appears."

As a result of its decision, the Court held that as the record did not affirmatively show the diverse citizenship of parties, the record did not "dis-

close a case of which the Court below could take cognizance."

In the *Mexican Cen. R. R. Co.* case (*supra*) the rule was thus stated, by Mr. Justice JACKSON, at p. 200:

"The proposition is not controverted that if it appears in the course of the trial that the controversy is not one of which the Court could take cognizance, by reason of the citizenship of the parties to it, the Circuit Court has the right, and it is its duty, to dismiss the cause for the want of jurisdiction."

The language of Mr. Justice HARLAN in *Thomas v. Board of Trustees* (*supra*) is likewise most significant:

"It is equally well established that when jurisdiction depends upon diverse citizenship the absence of sufficient averments or of facts in the records showing such required diversity of citizenship is fatal and cannot be overlooked by the Court, even if the parties fail to call attention to the defect or consent that it may be waived. Mansfield C. & L. M. Ry. Co. v. Swan, 111 U. S., 379; Martin v. B. & O. R. R Co., 151 U. S., 673, 689; Powers v. Chesapeake & Ohio Ry., 169 U. S., 92, 98. As late as in Minnesota v. Northern Securities Co., 194 U. S., 48, 62–63, we said, both parties insisting upon the jurisdiction of the Circuit Court: 'Consent of the parties can never confer jurisdiction upon a Federal Court. If the record does not affirmatively show jurisdiction in the Circuit, we must, upon our own motion, so declare and make such order as will prevent that Court from exercising an authority not conferred upon it by statute.' So that the fact stated in the certificate, that neither party in the Circuit Court objected to its jurisdiction is of no consequence."

IV.

It is respectfully submitted that the decree appealed from should be affirmed, with costs.

PHILIP J. BRITT,
Solicitor for Appellees.

JOHN J. ADAMS,
Of Counsel.

Supreme Court of the United States.

No. 477—October Term, 1904.

Bertha Doctor and Katherine Sayles, Appellants,
vs.
John J. Harrington, Dennis A. Harrington, Sol Sayles Company, and Sayles, Zahn Company.

Appeal from the Circuit Court of the United States for the Southern District of New York.

[February 20, 1905.]

The bill in this case was dismissed by the Circuit Court on the ground that it had no jurisdiction upon the fact alleged, and certified to this court the question of jurisdiction. The following is the question certified:

"Whether or not the complainants' bill of complaint showed that there was such diversity of citizenship between the parties complainant and parties defendant in this cause as would be sufficient under the provisions of the United States Revised Statutes to confer jurisdiction upon the United States Circuit Court for the Southern District of New York, of this cause."

The court further certified that it entered a decree dismissing the bill, "holding that it appeared from the said bill of complaint that there was no such diversity of citizenship between the parties complainant and defendant as would confer jurisdiction upon the United States Circuit Court for the Southern District of New York in the cause within the meaning of the United States Revised Statutes, and that in arranging the parties to this cause relatively to the controversy the Sol Sayles Company must be grouped on the side of the complainants, with the result that citizens of the same State would thus be parties on both sides of the litigation, and thus deprive this court of jurisdiction."

The bill is very voluminous, and, as it is agreed by appellees that the statement of appellants substantially states its allegation, we quote from appellants' brief as follows:

"This action was brought by the appellants, as stockholders of the Sol Sayles Company, a corporation organized under the laws of the State of New York, for the purpose of vacating and setting aside a judgment obtained by the appellees Harrington against the Sol Sayles Company in the Supreme Court of the State of New York, on October 28, 1902, and the levy and sale under an execution issued thereunder, and of requiring the appellees Harrington to deliver to the Sol Sayles Company certain shares of stock in the Sayles, Zahn Company, and certain bonds, belonging to the Sol Sayles Company, which had been sold under such execution, and for other equitable relief.

"In substance, the complainants allege in their bill of complaint that they are citizens of Morris County, New Jersey; that the defendants Harrington are citizens of the State of New York, and that the defendants Sol Sayles Company and Sayles, Zahn Company are likewise citizens of said State, both being incorporated under the laws of that State; that the Sol Sayles Company was organized with a capital stock of $100,000, divided into 1,000 shares of the par value of $100 per share, of which the complainants owned 500 shares and the defendants Harrington 500 shares; that by an arrangement made between the owners of the stock, the voting power on a majority thereof was given to the defendant John J. Harrington, who directed the management of the affairs of the corporation, dictated its policy, and selected its directors; that on January 26, 1898, the defendant John J. Harrington caused the defendant Sayles, Zahn Company to be organized, for the purpose of taking over the business of the defendant Sol Sayles Company and of one Henry Zahn, and thereupon the property of the Sol Sayles Company and of Zahn were transferred to the Sayles, Zahn Company, which likewise was controlled by the defendant John J. Harrington; that the Sol Sayles Company received, in consideration of the transfer of its property, $50,000 of the capital stock of the Sayles, Zahn Company, and subsequently subscribed for $50,000 additional stock.

"It is further alleged that about February 1, 1899, the defendants Harrington, for the purpose of cheating and defrauding the Sol Sayles Company, and the complainants, of their interest in the assets of the Sayles, Zahn Company, fraudulently caused the Sol Sayles Company to execute and deliver to them, without any consideration whatsoever, its promissory notes, aggregating $23,700, which were utterly fictitious, and thereafter, and on October 3, 1902, the defendants Harrington, in furtherance of their fraudulent scheme, caused an action to be instituted and a judgment to be recovered against the Sol Sayles Company, for the amount of the said promissory notes and interest which was alleged to have accrued thereon, the Sol Sayles Company being in utter ignorance of the nature of the action and omitting to interpose any defence thereto.

"This scheme resulted in the recovery of a judgment against the defendat Sol Sayles Company on October 28, 1902, for $27,357.28, in favor of the defendants Harrington, who thereupon caused an execution to be issued to the sheriff of the county of New York, against the property and assets of the Sol Sayles Company, under which execution the said sheriff levied on the shares of stock in the Sayles, Zahn Company, and also two bonds of the New Jersey Steamboat Company, which belonged to the Sol Sayles Company, and sold all of the right, title and interest of the Sol Sayles Company in the said certificates of stock and in the said bonds, the said defendants Harrington causing them to be purchased for their own benefit; said shares of stock being then, as the defendants Harrington well knew, and have ever since continued to be, worth upwards of $200,000.

"It further alleged that the complainants caused a demand to be made upon the defendants Harrington, that they transfer the said shares of stock and the said bonds to the Sol Sayles Company, but that they have refused to do so, and have insisted that these shares of stock and bonds are their personal and individual property, and that neither the Sol Sayles Com-

pany nor their complainants have any right, title or interest in either the said shares of stock or the said bonds, or any part thereof.

"The twentieth paragraph of the bill of complaint is as follows:

"'The complainants were and each of them was a shareholder of the defendant Sol Sayles Company at the time of the transactions herein complained of. This suit is not a collusive one to confer upon a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. The complainants are unable to secure any corporate action on the part of the defendant Sol Sayles Company to redress the wrongs hereinbefore set forth, nor are they able to obtain any redress at the hands of the stockholders of the said defendant Sol Sayles Company. The board of directors of said corporation is under the absolute control and domination of the defendant John J. Harrington, and the said Harrington, by reason of having possession of a majority of the capital stock of the said corporation, likewise controls the action of the stockholders. Although requested for information with regard to the facts hereinbefore set forth, he has refused to give any information with regard thereto, and has declined to redress the wrongs of which complaint is herein made, or to give to the complainants any opportuny to lay before the board of directors or the stockholders of the defendant Sol Sayles Company the facts herein set forth.'"

Mr. Justice McKenna, after stating the case, delivered the opinion of the Court.

To sustain the action of the Circuit Court in dismissing the bill the argument is as follows: (1.) By a conclusive presumption of law the stockholders of a corporation are deemed to be citizens of the State of the corporation's domicil. (2.) Granting that the complainants are citizens of New Jersey, yet as they are suing for the Sol Sayles Company, a New York corporation, that corporation, although in form a defendant, is in legal effect on the same side of the controversy as the complainants, and since it is a citizen of the same State as the other defendants, the Circuit Court had no jurisdiction, as the suit does not involve a controversy between citizens of different States.

1. This is based on the assumption adopted by this court, that stockholders of a corporation are citizens of the State which created the corporation—an assumption physically possible but hardly true in a single instance; and appellants here contend that it should be classed with the fictions of the law and subject to one of their fundamental maxims, and cannot be carried beyond the reasons which caused its adoption necessarily requisite. It is, however, more of a presumption than a fiction, but whether we regard it as either, it cannot be pushed to the end contended for by appellees.

The reason of the presumption (we will so denominate it) was to establish the citizenship of the legal entity for the purpose of jurisdiction in the Federal courts. Before its adoption difficulties had been encountered

on account of the conditions under which jurisdiction was given to those courts. A corporation is constituted, it is true, of all its stockholders, but it has a legal existence separate from them—rights and obligations separate from them; and may have obligations to them. It can sue and be sued. At first this could be done in the Circuit Court of the United States only when the corporation was composed of citizens of the State which created it. (*Bank of United States* v. *Deveaux*, 5 Cranch, 61; *Hope Insurance Company* v. *Boardman*, 5 Cranch, 57.) But the limitation came to be seen as almost a denial of jurisdiction to or against corporations in the Federal courts, and in *Louisville &c. Railroad Company* v. *Letson*, (2 How. 497,) prior cases were reviewed; and this doctrine laid down:

"That a corporation created by and doing business in a particular State is to be deemed to all intents and purposes as a person, although an artificial person, capable of being treated as a citizen of that State, as much as a natural person." And "when the corporation exercises its powers in the State which chartered it, that is its residence, and such an averment is sufficient to give the Circuit Court jurisdiction."

The presumption that the citizenship of the corporators should be that of the domicil of the corporation was not then formulated. That came afterwards, and overcame the difficulty and objection that the legal creation, the corporation, could not be a citizen within the meaning of the Constitution. (*Marshal* v. *B. & O. Railroad Company*, 16 How. 314.) This, then, was its purpose, and to stretch beyond this is to stretch it to wrong. It is one thing to give to a corporation a status, and another thing to take from a citizen the right given him by the Constitution of the United States. Disregarding the purpose of the presumption, it is easy to represent it, as counsel does, as illogical if not extended to every stockholder; but as easy it would be to show its falseness if so applied. But such charges and countercharges are aside from the question. To the fact and place of incorporation the law attaches its presumption for a special purpose. Perhaps, as intimated in *St. Louis & San Francisco Ry.* v. *James*, (161 U. S. 545, 563,) this "went to the verge of judicial power." Against the further step urged by appellees we encounter the Constitution of the United States.

2. The ninety-fourth rule in equity contemplates that there may be, and provides for, a suit brought by a stockholder in a corporation founded on rights which may properly be asserted by the corporation. And the decisions of this court establish that such a suit, when between citizens of different States, involves a controversy cognizable in a Circuit Court of the United States. The ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a control antagonistic to him, and made to act in a way detrimental to his rights. In other words his interests, and the interests of the corporation, may be made subservient to some illegal pur-

pose. If a controversy hence arise, and the other conditions of jurisdiction exist, it can be litigated in a Federal court.

In *Detroit* v. *Dean*, (106 U. S. 537,) Dean, who was a citizen of New York and a stockholder in the Mutual Gas Light Company, a Michigan corporation, in order to protect its right and property against the threatened action of a third party brought suit against the latter and the corporation in the Circuit Court of the United States for the Eastern District of Michigan. This court ordered the bill dismissed, not because Dean and the corporation had identical interests, but because the refusal of the directors of the corporation to sue was collusive. The right of a stockholder to sue a corporation for the protection of his rights was recognized, the condition only being the refusal of the directors to act, which refusal, it is said, must be real, not feigned. *Hawes* v. *Oakland*, (104 U. S. 450,) was cited, where a like right was decided to exist. See also *Dodge* v. *Woolsey*, (18 How. 331;) *Davenport* v. *Dows*, (18 Wall. 626;) *Memphis* v. *Dean*, (8 Wall. 73;) *Greenwood* v. *Freight Company*, (105 U. S. 16;) *Quincy* v. *Steel*, (120 U. S. 241.) It was said that in *Dodge* v. *Woolsey*, that the refusal of the directors to sue caused them and Woolsey, who was a stockholder in a corporation of which they were directors, "to occupy antagonistic grounds in respect to the controversy, which their refusal to sue forced him to take in defence of his rights." *Dodge* v. *Woolsey* was modified by *Hawes* v. *Oakland*, as to what circumstances would justify a suit by a stockholder if the directors refuse to sue. See also *Quincy* v. *Steel*, *supra*.

The case at bar is brought within the doctrine of those cases by the allegations of the bill. The defendant corporations are alleged to be under the control of John J. and Dennis A. Harrington, and that complainants are unable to secure any corporate action on the part of the defendant, the Sol Sayles Company, to redress the wrongs complained of. It is also alleged that the Harringtons control the action of the stockholders, and have declined to redress the wrongs complained of or give complainants any opportunity to lay before the board of directors or the stockholders of the Sol Sayles Company the facts alleged It is also alleged the suit is not collusive. It is manifest that if the matter alleged be true, complainants will suffer irremediable loss if not permitted to sue, and as they had a cause of action they rightly brought it in the Circuit Court of the United States.

Decree reversed.